

1 IN THE UNITED STATES DISTRICT COURT

2 DISTRICT OF UTAH

3 CENTRAL DIVISION

4  
5 PURPLE INNOVATIONS, a )

6 Delaware limited liability )

7 company, )

8 Plaintiff, )

9 vs. )

Case No. 2:17-CV-138DB

10 HONEST REVIEWS, a Florida )

11 corporation, et al., )

12 Defendants. )

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15  
16 BEFORE THE HONORABLE DEE BENSON

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18 July 7, 2017

19  
20 Motion Hearing

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1 July 7, 2017

11:00 a.m.

2 P R O C E E D I N G S

3  
4 THE COURT: Good morning.

5 Let me get my glasses out and I will read the name  
6 of this case. Purple Innovations, L.L.C. versus Honest  
7 Reviews, L.L.C. and others. The case number is 17-CV-138.

8 I see at this table Mr. James Magleby. I will ask  
9 him to stand up and introduce the other lawyers who are here  
10 representing this side, because it looks like a lot of you,  
11 and then I'll ask the other side to do the same.

12 With that --

13 MR. MAGLEBY: Thank you, Your Honor. I do need a  
14 lot of help. I have here with me Christine Greenwood and  
15 Adam Alba of my office. Also with us here is Casey  
16 McGarvey, chief legal officer for Purple, Craig Heiman,  
17 in-house counsel with Purple. Jordan Cameron is here, but  
18 he is not entering an appearance, but he consults with the  
19 company on regulatory matters and he is here because this  
20 case touches on the C.P.S.C. issues.

21 THE COURT: He is not entering an appearance, he  
22 is making an appearance.

23 MR. MAGLEBY: He is.

24 THE COURT: He is here. Okay.

25 Is that everyone?

1 MR. MAGLEBY: Yes, he is here.

2 THE COURT: Okay. Please.

3 MR. RANDAZZA: Yes, Your Honor. Marc Randazza for  
4 Honest Mattress Reviews, and Mr. Monahan. I also have here  
5 Mr. Gill Sperlein and Andy McCullough.

6 THE COURT: I know Mr. McCullough from way back.

7 Which is Mr. Monahan? Didn't you say --  
8 representing Mr. Monahan.

9 Who is next to you?

10 MR. RANDAZZA: This is Mr. Gill Sperlein.

11 THE COURT: Okay.

12 MR. RANDAZZA: There is another team here as well.

13 THE COURT: Mr. Sperlein is with -- I see it,  
14 S-p-e-r-l-e-i-n.

15 MR. SPERLEIN: That is correct, Your Honor.

16 THE COURT: Nice to have you here.

17 Then behind you?

18 MS. SMITH: Kathryn Smith, Your Honor, and this is  
19 Eleanor Yost, and on behalf of the defendant GhostBed.

20 THE COURT: Ms. Smith, you are with Strong &  
21 Hanni?

22 MS. SMITH: Yes.

23 THE COURT: Ms. Yost, you are with Carlton Fields,  
24 correct?

25 Nice to have you all here.

1           We're here on GhostBed, Inc.'s motion to dismiss  
2     the first amended complaint on jurisdictional grounds and on  
3     Rule 12(b)(6) as to some of the causes of action. We're  
4     also here on the plaintiff's motion for preliminary  
5     injunction. You mix the word T.R.O. in there somehow as  
6     well, but this is only a preliminary injunction that you're  
7     seeking. We have both sides here, and I think a T.R.O. is  
8     not even a thing under the federal rules when we have both  
9     sides represented. It is either a preliminary injunction or  
10    nothing. Those are the motions.

11           Which order did you all want to take them up in?

12           MR. MAGLEBY: Your Honor, although they did file  
13    their motions first, in the T.R.O. motion we'll touch on a  
14    bunch of the new evidence that led to the filing of the  
15    injunction papers and it will overlap substantially with the  
16    motions to dismiss. It is also, of course, of great  
17    importance to our client, so I think we should go with that  
18    first and I think that will make the other motions more  
19    streamlined.

20           MR. RANDAZZA: Your Honor, we would naturally  
21    disagree. I think if the Court does not have jurisdiction,  
22    then that would be the end of the day and we all go home a  
23    little earlier.

24           THE COURT: Well --

25           MR. RANDAZZA: I respectfully say that the

1 12(b)(2) motion should be heard first.

2 THE COURT: Well, their argument against your  
3 motion will address the facts and it is all going to be one  
4 big jumbled mess. I don't know that it matters really.

5 Let's start with the motion to dismiss. If they  
6 win round one in this Ping-Pong match, then we'll see where  
7 we get to, but I can't imagine we won't hit all of the same  
8 issues addressing both of these motions here today. We'll  
9 start with the motion to dismiss.

10 Which one of you two wants to go first?

11 MR. RANDAZZA: I believe I will defer to GhostBed,  
12 Your Honor.

13 MS. YOST: Thank you, Your Honor.

14 Before we begin, I do have two preliminary matters  
15 if you would indulge me.

16 THE COURT: I have a preliminary matter. Would  
17 you step up to the podium, please.

18 MS. YOST: Certainly.

19 THE COURT: What is your preliminary matter?

20 MS. YOST: First, before we get to the substance  
21 of the motion, we will be touching on certain information  
22 that has been designated confidential under the protective  
23 order and I, unfortunately, do not know the folks in the  
24 gallery today, and I would like to ask Your Honor's  
25 instruction on how you would like to handle that.

1           THE COURT: I think they are all law clerks or law  
2 interns.

3           Are you here representing anyone?

4           MR. KAPLAN: Your Honor, Neil Kaplan. I am really  
5 observing. If I need to be excused, that is fine. I do  
6 have affiliation with Purple, but I have not entered my  
7 appearance in this case. Whatever the Court would like to  
8 do.

9           THE COURT: This is Mr. Neil Kaplan. He is a  
10 lawyer in town.

11          Tell me what it is that you think we're going to  
12 get into that is --

13          MS. YOST: Very specifically in connection with  
14 the motion to dismiss we're going to be talking a little bit  
15 about GhostBed sales information with respect to its sales  
16 to customers in Utah.

17          THE COURT: Is that covered by some protective  
18 order or agreement between the parties as confidential?

19          MS. YOST: It is covered by the protective order.

20          THE COURT: It is.

21          You agree with that?

22          MR. MAGLEBY: Yes. Excuse me, Your Honor.

23          They have designated that information as either  
24 confidential or A.E.O., and so that is fair game, and if we  
25 need to excuse somebody when we get to that piece of the

1 argument, I understand that. Obviously my client  
2 representatives need to be here for the rest of the  
3 argument. Frankly, I am not convinced that the information  
4 is that particularly sensitive in nature, but that is not my  
5 call.

6 THE COURT: Well, apparently it was. You entered  
7 into some agreement. The defendants here keep wanting to  
8 remind me about the First Amendment, and there is a little  
9 thing about courts being public, and we have too many of  
10 these things.

11 MR. MAGLEBY: Your Honor, we are operating under  
12 the standard protective order in the Utah district which  
13 automatically applies, and so they have designated materials  
14 under that protective order and, of course, we're complying  
15 with it. We have not taken the time to challenge that  
16 designation. That didn't seem to be a good use of  
17 resources.

18 THE COURT: Well, the only person in court other  
19 than the court personnel is the court security officer. Mr.  
20 Kaplan is the only -- if you get to a point where you think  
21 he needs to be excused, or if someone else comes in and you  
22 think this information is that important that it needs to be  
23 kept confidential, then let me know and we'll ask Mr. Kaplan  
24 to leave.

25 MS. YOST: Thank you, Your Honor. I will try to



1 keep it at a high level so maybe we won't need to do that.

2 THE COURT: Okay.

3 MS. YOST: The second preliminary issue that we  
4 have is Your Honor might be aware that following all of the  
5 briefing on both the motion to dismiss and on Purple's  
6 preliminary injunction motion, Purple filed two supplemental  
7 briefs in the last week and then, of course, there was a  
8 flurry of additional filings complaining.

9 The issue that we have particular concern about is  
10 whether we're going to be discussing the evidence included  
11 with those, quote, unquote, supplemental briefs today. In  
12 particular, one brief that we have concern about that was  
13 filed late last week involved a former employee of GhostBed,  
14 the former director of marketing, and we understand that it  
15 has come to light in the last few days that it is possible  
16 that Purple's counsel was communicating with that former  
17 employee while she was a current employee at GhostBed, and  
18 we would ask that Your Honor disregard that information at  
19 this time.

20 THE COURT: Well, let me rule on that. Thank you.

21 There is a motion to strike and for sanctions.  
22 That motion is denied. I am accepting all of the  
23 supplemental authority in the supplemental memoranda. There  
24 was supplemental authority provided to the Court by your  
25 client, I think --

1 MS. YOST: Yes, Your Honor.

2 THE COURT: -- if I am not getting the defendants  
3 mixed up.

4 You are GhostBed?

5 MS. YOST: That is right.

6 THE COURT: I'm accepting that and I am accepting  
7 the two supplemental submissions by Purple.

8 MS. YOST: Thank you, Your Honor.

9 In particular, though, with that one declaration  
10 of our former employee, Purple's counsel was communicating  
11 with her while she was a current employee. In other words,  
12 Purple's counsel, we understand it, was communicating before  
13 she left her employment, which we understand, at least in  
14 Utah, is an ethical violation.

15 THE COURT: You have gone over that already and I  
16 have denied any request to not consider it. If you want to  
17 bring that up later -- I didn't see that in any written  
18 motion to strike.

19 MS. YOST: No, Your Honor. It just happened in  
20 the last few days.

21 THE COURT: Right. You're telling me that today?

22 MS. YOST: Is just happened. This declaration was  
23 submitted by Purple a few days ago.

24 THE COURT: I know, but you had time to refer to  
25 it in a footnote in your motion to strike the other

1 declaration.

2 MS. YOST: No, Your Honor. I am sorry. Our  
3 co-defendant filed that paper.

4 THE COURT: Well, now I am getting confused.

5 MS. YOST: I apologize if I confused you.

6 THE COURT: I didn't see anything from you that  
7 delivered this information that you are delivering today.

8 MS. YOST: Right. It just came to light.

9 THE COURT: That won't cause me to not allow that  
10 declaration to be considered today in connection with both  
11 your motion to dismiss and in connection with their motion  
12 for a preliminary injunction.

13 MS. YOST: Thank you, Your Honor.

14 THE COURT: Thank you.

15 MS. YOST: Turning to the substance of GhostBed's  
16 motion to dismiss, and I would like to primarily spend my  
17 time talking about the jurisdictional issue. GhostBed, as  
18 you know, Your Honor, has moved to dismiss on the basis of a  
19 lack of personal jurisdiction over GhostBed.

20 Turning first to the question of general  
21 jurisdiction, which Purple has alleged exists here, as set  
22 forth in the papers and in detail and, of course, in the  
23 declaration of our C.E.O., Marc Werner, GhostBed has no  
24 physical presence in Utah. As Your Honor is aware, Purple  
25 has sued three co-defendants that reside in Florida, and all

1 of the action, of course, in this case has taken place in  
2 Florida.

3 As we set forth in our paper, we don't have any  
4 offices in Utah. We have no bank accounts in Utah. We have  
5 no travel into Utah for business purposes. Truly there is  
6 no home here in any meaningful sense. These facts are  
7 undisputed, and the facts set forth in Mr. Werner's  
8 declaration are also undisputed.

9 Purple's opposition to our motion points to four  
10 specific items in support of their contention that this  
11 Court has general jurisdiction over GhostBed here. First is  
12 a small number of product shipments to Utah of GhostBed's  
13 own products, which are not at issue in this litigation, and  
14 those shipments were to addresses that were final addresses  
15 in Utah itself.

16 Purple also points to GhostBed's registration of  
17 warranties for some of those same products that were shipped  
18 to Utah, a couple of communications with Utah consumers, or  
19 at least communications over Facebook where the poster was  
20 identified as sitting in Utah at the time of the  
21 communication, and I think there were two or three of those.

22 Finally, they point to national Internet  
23 advertisements that GhostBed makes on its own website and  
24 through social media that were available anywhere in the  
25 country.

1 I would assert, Your Honor, that none of these  
2 show that there is a substantial and continuous connection  
3 between GhostBed and Utah that is required here for general  
4 jurisdiction. While it is true that GhostBed does in fact  
5 advertise and sell its own products over the Internet and  
6 through its website, that website is equally available to  
7 all consumers in the country and, in fact, throughout the  
8 world. Customers log in and order products through the  
9 website and in fact they can ask questions about the  
10 products.

11 It is also true that through its website GhostBed  
12 and its affiliate company have shipped a certain number of  
13 products into Utah, but those sales, as set forth in the  
14 papers, amount to roughly one percent of GhostBed's total  
15 national sales, an incredibly small number in the grand  
16 scheme of things.

17 GhostBed has also received truthfully a miniscule  
18 number of warranty registrations from those Utah customers.  
19 I believe Purple cited to three of them, which is also an  
20 incredibly tiny number in the overall scheme of how many  
21 warranty registrations GhostBed receives.

22 I believe that Purple also pointed to two cases  
23 where customers contacted GhostBed with questions. Of  
24 course, we note that that was folks reaching out to  
25 GhostBed, not GhostBed reaching into Utah. That is it.

1 That is all of the evidence we have in the record concerning  
2 this issue. I would submit one percent of GhostBed's total  
3 sales, three warranty registrations and a handful of  
4 communications with folks could not approximate the required  
5 physical presence within the state that we need to find  
6 general jurisdiction here.

7 The cases that have been cited in the briefs are  
8 pretty consistent in saying that engaging in commerce with  
9 regular use of the forum is not in and of itself the kind of  
10 activity that equals a physical presence in the state, and  
11 certainly a website might subject the defendant to general  
12 jurisdiction, but only when we have actually and  
13 deliberately engaged in a substantial number of sales such  
14 that we can say that a defendant like GhostBed is actually  
15 operating here and availing itself of Utah's laws,  
16 essentially conceding that the numbers that we're talking  
17 about here, particularly with respect to GhostBed's sales,  
18 the customers are tiny, and Purple cites in its opposition  
19 to a handful of cases that have found a defendant to be  
20 subject to general jurisdiction in Utah when there have been  
21 sales of their own products to customers.

22 Now, in all of those cases the number of sales  
23 were substantial, and in the two particular cases that  
24 Purple cited in its brief, not only were their sales of the  
25 products into Utah, there are also additional indicia of

1 operating in Utah. In fact, one case is the Icon Health  
2 case, and they not only had a defendant who was selling  
3 product into Utah, but they attended trade shows, they made  
4 a large amount of sales, they had a network of distributors  
5 locally here, and then had those folks go through a rather  
6 extensive application process. Of course, none of those  
7 facts are present here. The only thing we have here, again,  
8 is barely one percent of the national sales that end up here  
9 with final shipment addresses.

10 In short, GhostBed's contacts we submit are not  
11 sufficient for general jurisdiction.

12 At this point, unless Your Honor has any  
13 questions, I will turn to specific personal jurisdiction.

14 All of the contacts that Purple has cited in  
15 connection with general jurisdiction of course need to be  
16 put aside, because none of those contacts have anything to  
17 do with their actual claims in this case, which all arise  
18 from a third-party website which is operated by our  
19 co-defendants, and that is the honestmattressreviews.com  
20 website. All of the conduct we're talking about occurred on  
21 the website or is related to statements about the website  
22 and various social media. GhostBed has submitted evidence  
23 that it does not own this website and it does not operate  
24 this website.

25 THE COURT: I didn't catch any of that.

1 MS. YOST: I am sorry, Your Honor.

2 GhostBed has submitted evidence in connection with  
3 its motion that it does not own or operate this website. I  
4 think it is at this point undisputed that it does not own  
5 the website. It does not control it in any way, as set  
6 forth in both the declarations of our C.E.O., Marc Werner,  
7 and also our co-defendant, Ryan Monahan, who is, as  
8 co-counsel undoubtedly will get up and tell you himself, the  
9 owner and operator of that website.

10 All of the record evidence in fact shows that  
11 Defendant Monahan is not an employee of GhostBed. We have  
12 actually had a lot of briefing on that issue in particular,  
13 and Purple's complaint as filed alleged essentially that  
14 Mr. Monahan was a GhostBed employee but that is not true.  
15 We have had several declarations now in the record to that  
16 effect from GhostBed and Mr. Monahan himself.

17 Mr. Monahan has also indicated in his briefs that  
18 he has not received any consideration of any kind including  
19 a salary or payments from GhostBed for his work on this  
20 third-party website.

21 All of that being said, the complaint about  
22 activity here has all been conducted, even if we accept that  
23 it happened and it is true, by our co-defendant. GhostBed  
24 had nothing to do with that. There are none of the contacts  
25 we need with Utah with respect to specific jurisdiction and



1 that also connect to the actual claims at issue in this case  
2 that would give specific jurisdiction over GhostBed.

3 One other issue that was raised in Purple's brief  
4 on this particular issue was essentially saying that because  
5 GhostBed knew in some respect that Purple was located in  
6 Utah, and I believe it is a Delaware corporation, although  
7 counsel can correct me if I am wrong, but it should know  
8 that its actions would affect Purple in Utah and knowing  
9 about that effect, that would subject it to specific  
10 jurisdiction here.

11 THE COURT: Well, they claim more than that. They  
12 claim that it was intended to affect and harm the business.

13 MS. YOST: That is right, but there is no evidence  
14 for that, Your Honor. There is nothing to say that GhostBed  
15 made any statement whatsoever. There is no evidence that --

16 THE COURT: Well, but their allegation certainly  
17 is that GhostBed was complicit with Mr. Monahan and that  
18 they were working hand in hand.

19 MS. YOST: Even if that were true, Your Honor, and  
20 we, of course, dispute that, and you're right that Purple is  
21 alleging that there is some kind of a conspiracy here or  
22 that GhostBed was encouraging these things to happen, and as  
23 co-counsel undoubtedly will tell you, and even if all of  
24 that were true and the conspiracy existed, the website that  
25 we're talking about here is a passive commentary website.

1 If we look at the cases involving specific jurisdiction,  
2 there is just not enough to hail us into Utah even under  
3 those facts.

4 There have been allegations that we directed all  
5 of this activity toward Purple specifically, and I'm sure my  
6 colleagues will talk to you specifically about the website  
7 itself, but my understanding is that the website actually  
8 speaks to many, many different products. It would be one  
9 thing, and there have been cases where someone has derived a  
10 completely specific website directed at one party, even if  
11 the domain name and the entire thing had to do with one part  
12 entity, but that is not the case here. This is a review  
13 website that looks at various products from various  
14 companies.

15 Certainly the passiveness of this commentary alone  
16 would, as I am sure my colleagues will speak to, not give  
17 rise to specific jurisdiction here under the same case law,  
18 that we need more, we need more in Utah, and it would be  
19 more appropriate, if that is the case, that all of this  
20 activity which occurred in Florida and all of the defendants  
21 reside in Florida, deal with that in Florida.

22 Turning quickly to the question of the burden here  
23 on GhostBed and whether jurisdiction here is consistent with  
24 fair play and substantial justice, as I mentioned GhostBed  
25 is a Delaware corporation and its headquarters are in

1 Florida.

2 THE COURT: When you attached Exhibit 3 to your  
3 reply, and in it you're making the same argument you just  
4 made to me here orally, and you say that the Honest Reviews  
5 website does not rate GhostBed anymore highly than it rates  
6 several other mattress companies.

7 Right?

8 MS. YOST: That is true, Your Honor. Yes.

9 THE COURT: And then as I scroll through this,  
10 there are multiple pages rating all of the different  
11 mattresses. When I get to the last page we get to Purple.  
12 Of all of the ratings, that is the only one that has three  
13 X's. Do you see that? I'm holding it up here. So we're on  
14 really the same page --

15 MS. YOST: Yes, Your Honor.

16 THE COURT: So you're going to stand there and  
17 tell me, and I'm only speaking to their allegations, that  
18 this is not directed at just seriously harming one company?

19 MS. YOST: Your Honor, as far as --

20 THE COURT: It is the only company that gets X's.  
21 In fact, no other company even gets one X.

22 MS. YOST: Certainly, Your Honor.

23 As far as I understand what the X's mean, and my  
24 co-counsel can speak to that, but I understand that the X's  
25 were put here after the compliant was filed by Mr. Monahan

1 in response to being sued by Purple for expressing his  
2 opinion about the mattress.

3 THE COURT: Well --

4 MS. YOST: Certainly my co-counsel can correct me  
5 if that is wrong.

6 THE COURT: The X's mean poor and they are poor in  
7 every category.

8 MR. RANDAZZA: Your Honor, she is correct.

9 THE COURT: I can hear from you, sir, later.

10 I'm just going to your argument that you're  
11 saying, well, it is a website and Honest Reviews is just  
12 doing what it says it does, honest reviews, but when you  
13 look at that, that is at least some evidence that they are  
14 singling out one company, and you are saying that they did  
15 it only because they got sued?

16 MS. YOST: There is a blog post on this --

17 THE COURT: Only because Purple sued GhostBed and  
18 the Honest Reviews website owner.

19 MS. YOST: Let me unpack that. Mr. Monahan, who  
20 operates this website, I believe posted these three X's  
21 after the complaint was filed because Purple sued him. It  
22 had nothing to do with GhostBed. We didn't tell anyone to  
23 put X's anywhere.

24 THE COURT: Well, of course --

25 MS. YOST: These three --

1 THE COURT: Let me interrupt you.

2 You say that and you keep saying that GhostBed had  
3 nothing to do with this. In light of this most recent  
4 declaration of Ms. Anderson, and their allegations all along  
5 have been that GhostBed had everything to do with this, and  
6 --

7 MS. YOST: You are right, Your Honor, that --

8 THE COURT: -- that they and Mr. Monahan are  
9 working hand in hand to ruin their company. That is  
10 essentially their case. You want to talk today about how  
11 few sales percentage-wise GhostBed has in Utah and all of  
12 this, but when we get right down to the nub of this case,  
13 they are saying that GhostBed is complicit with Mr. Monahan,  
14 and I know I am repeating myself, reaching into Utah to  
15 attack a Utah company, and it may be incorporated in  
16 Delaware, but I don't think there is any dispute that it is  
17 a company that is headquartered here and has its main  
18 operation located in Utah.

19 That is what I need to grapple with, and based on  
20 taking their evidence in the light most favorable to them,  
21 to see if they have at this early -- it is not that early in  
22 this case, but this relatively early stage of the  
23 proceedings, whether they have made a prima facie case that  
24 your client, if their allegations are correct, and if they  
25 have enough allegations to support them, does not violate

1 traditional notions of fair play and substantial justice and  
2 meets the other requirements of Utah's Long Arm Statute.  
3 That is what I need to focus on.

4 MS. YOST: Absolutely, Your Honor.

5 If I could make three brief points in response to  
6 that, first, and just turning back to this website quickly,  
7 from what I understand from earlier filings in this case,  
8 Purple actually had a fairly good review on Honest Mattress  
9 Reviews, and then Mr. Monahan, and this is what I understand  
10 from the pleadings, contacted them to ask questions about  
11 certain powders that were in their mattress and didn't  
12 receive a response, and then changed those good reviews  
13 basically to say in blog posts, and I'm happy to go find  
14 those particular posts for Your Honor, and I believe they  
15 were filed as exhibits in response to the original T.R.O.  
16 motion that Purple filed, but changed those because he felt  
17 that he was not receiving a significant serious response  
18 from Purple about his questions about their product and then  
19 changed the response.

20 THE COURT: I understand that side of the story,  
21 and I heard that during the earlier briefing and argument on  
22 the T.R.O. which I dissolved, mainly, or at least in  
23 significant part, because I didn't see a connection between  
24 GhostBed and Mr. Monahan and was operating with respect to  
25 an argument that free speech should prevail so long as it is

1 something approaching fair free speech, and buying at least  
2 that there was an argument, a credible argument it appeared  
3 to me, and not assessing the credibility of witnesses, but  
4 assessing the weight of the evidence that Mr. Monahan was  
5 operating independently and that there was some basis from  
6 an expert that maybe this powder was causing the kinds of  
7 harms he wanted to claim it caused.

8 But in light of this most recent declaration of  
9 Ms. Anderson, she says that Mr. Werner and Mr. Monahan were  
10 working together very closely, and I'm sure you have read  
11 the declaration, and that Mr. Werner, your client, would go  
12 on rants about Purple and this powder. I'm sure Mr. Magleby  
13 is going to tell me when he stands up that that shows that  
14 there was absolute collusion between what Honest Mattress  
15 Reviews was stating and what Mr. Werner wanted it to state.

16 MS. YOST: Yes, Your Honor. I agree that looking  
17 at Ms. Anderson's declaration, the first round it looks  
18 concerning, it does, but if you dig down into what she  
19 actually says, I think you'll see that what she does not say  
20 is more important.

21 What she does not say is that GhostBed and Mr.  
22 Monahan had anything to do together with respect to the  
23 website that is at issue in this case. She does not say  
24 that GhostBed paid Mr. Monahan to create the website. She  
25 does not say that GhostBed had anything to do with the

1 content on the website. She makes no factual statement that  
2 GhostBed had any relationship whatsoever to the website that  
3 is at issue in the complaint here.

4 While I understand Your Honor's reaction, which  
5 was the same as mine, which it looks like there is an  
6 internal employee who is blowing the whistle on something  
7 that she is concerned about, she also threatened the C.E.O.  
8 when she knew she was going be fired that she would go off  
9 and do activities like this that would damage the company.  
10 In fact, she called counsel before she left the company to  
11 give that information to them, you know, without going  
12 through management or their counsel or anything else.

13 Now, I am sure that discovery we'll get into the  
14 veracity of Ms. Anderson's statements, but very specifically  
15 with respect to her evidence, it does not give us the  
16 connection that we are looking for. She does not say I saw  
17 checks go out to Mr. Monahan, or I saw checks being sent to  
18 Honest Reviews. She was the director of marketing,  
19 remember.

20 Now, she is the woman who is in charge of  
21 GhostBed's outward facing advertising, and if anyone would  
22 have information about these payments she would be able to  
23 testify to it and she didn't because it does not exist.

24 THE COURT: Well, she said that she thought he was  
25 being paid under the table. I guess we'll hear more about



1 that maybe later. I don't know. I just know that the  
2 connection that she paints is entirely the opposite of what  
3 I have been told by GhostBed's attorneys and Mr. Monahan's  
4 attorneys before that declaration was filed.

5 MS. YOST: Your Honor, with respect to the  
6 connection, I want to be clear that we have been up front  
7 since day one, since our first hearing in the case, that Mr.  
8 Monahan was a consultant for the company. He said that  
9 specifically straight out in his declaration that was filed  
10 before the last hearing on the T.R.O. Mr. Werner said the  
11 same thing. There has never been a point in this case where  
12 we have tried to hide the fact that Mr. Monahan was a  
13 consultant with respect to certain GhostBed advertising on  
14 Facebook. Those are in the record and we have never tried  
15 to hide that connection.

16 The connection that is relevant here, though, is  
17 whether GhostBed has anything to do with Honest Reviews,  
18 L.L.C., which is a separate company that Mr. Monahan has.  
19 There is nothing, even in Ms. Anderson's declaration, and  
20 even in the recent motion that was filed that draws that  
21 connection. Certainly what Mr. Monahan does in his spare  
22 time, even if he worked on other projects with GhostBed,  
23 cannot be just flatly imputed to GhostBed despite the fact  
24 that they had a relationship.

25 The point here is Purple is trying to say, look,

1 there is smoke and, therefore, there must be fire.

2 THE COURT: In Mr. Werner's, your client's  
3 declaration, which I assume you knew about, in paragraph six  
4 he says GhostBed does not have any affiliation whatsoever  
5 with co-defendants Honest Reviews, L.L.C or Mr. Monahan.

6 MS. YOST: I will pull up the declaration. I am  
7 confident, sir, that the declaration goes on to discuss the  
8 fact that Mr. Monahan is an advertising consultant for  
9 GhostBed.

10 THE COURT: I think he says that but that is a  
11 pretty straight statement. He says no affiliation with Mr.  
12 Monahan. Disputed facts, and that is what cases are all  
13 about, I suppose.

14 MS. YOST: Yes, Your Honor.

15 If you don't mind, I would just turn briefly back  
16 to the jurisdictional issue very quickly.

17 THE COURT: I thought that is what we have always  
18 been on.

19 MS. YOST: Yes.

20 THE COURT: I hoped.

21 MS. YOST: That is right.

22 Again, regarding GhostBed's burden specifically,  
23 because all of the witnesses and the activity, even if true,  
24 even if all of this is true and even if the conspiracy is  
25 true and even if we assume that, all of the activity took

1 place in Florida. All three of the co-defendants are in  
2 Florida. The witnesses, including Ms. Anderson, who Purple  
3 now relies on, is in Florida. The documents are in Florida.  
4 There is nothing other than Purple in Utah. At this point  
5 it seems that venue would be more appropriate now in  
6 Florida.

7 THE COURT: Before we get off your other argument  
8 on jurisdiction, could I ask you this, because I was  
9 intrigued by something you wrote in your reply brief. You  
10 say on page 3 even if we assume for the sake of argument  
11 that GhostBed targeted Purple, a Utah business, Purple must,  
12 nevertheless, show that Utah as the forum state was the  
13 focal point of the alleged tort. Then you cite a Tenth  
14 Circuit case, a 2008 case, and you quote from it. Some  
15 courts have held that the expressly aimed portion of Calder,  
16 which was the Supreme Court case, is satisfied when the  
17 defendant individually targets a known forum resident. We  
18 have taken, and then there are ellipses, and I don't know  
19 what is left out and I have not read it, but we have taken a  
20 somewhat more restrictive approach holding that the forum  
21 state itself must be the, quote, focal point of the tort.  
22 We have more than a tort alleged here.

23 Anyway, I find that intriguing. What is it that  
24 you think that means, because the plaintiff's case here  
25 clearly alleges that the focal point of the alleged

1 misconduct was against Purple, a Utah based business, but  
2 you tell me that I need to look more at whether the  
3 activity, even if the allegations are true, was directed at  
4 the forum state.

5 Do you understand that difference, because I'm not  
6 sure that I do?

7 MS. YOST: Absolutely, Your Honor.

8 I think very succinctly what the Court is saying  
9 here is the fact that Purple happens to be here, and it is  
10 not headquartered here, but --

11 THE COURT: Not happens, is here.

12 MS. YOST: Has a facility here.

13 THE COURT: Right. They are directing their  
14 wrongful conduct, if you assume that that is true for a  
15 second, and I am asking a legal question, so what does that  
16 mean that it has to be directed at the forum state?

17 MS. YOST: I think it needs to be something more  
18 than just the plaintiff in this case, that there has to be a  
19 specific Utah connection, Utah consumers and Utah  
20 advertising.

21 I think in the context, for example, of the Calder  
22 case, what the Court was talking about there -- of course,  
23 there was Ms. Jones who was allegedly the focal point of the  
24 tort, but what the Court considered was that in California  
25 and in the industry that she was in, Hollywood was the

1 broader focal point there. I don't think that here we have  
2 a mattress industry or something that apart from Purple has  
3 any impact whatsoever on Utah.

4 To my knowledge, and I'm sure counsel will correct  
5 me, I have not seen Utah consumers, for example, commenting  
6 to GhostBed or to Mr. Monahan that --

7 THE COURT: So you need something more than just  
8 the fact that Purple is operating out of Utah. What is that  
9 something more, that the State of Utah is somehow a big  
10 mattress state?

11 MS. YOST: That is the one example I thought of,  
12 Your Honor, and perhaps the plaintiff can think of others,  
13 but I think there needs to be something beyond the fact that  
14 the facility is located here, that the alleged conduct  
15 focused on turning the minds of Utah consumers, for example.  
16 I am now going down a path of hypotheticals that I have not  
17 given too much thought to, but I think the idea is that the  
18 facility is here and Purple is here, but unilateral conduct  
19 or the existence of Purple in and of itself in the state is  
20 not sufficient, at least in that case. What we're looking  
21 for here is something else, something that gives us the hook  
22 into Utah beyond that.

23 Unfortunately, I don't have a great second or  
24 third case to cite to you off the top of my head that  
25 explains that in any helpful way, but I will ponder on it as

1 we move forward.

2 THE COURT: Okay.

3 MS. YOST: Unless you have any other questions --

4 THE COURT: I don't. Was your motion joined in by  
5 Mr. Monahan?

6 MS. YOST: Mr. Monahan has his own motion, but it  
7 is probably quite a bit along the same lines.

8 THE COURT: So next I guess then I'm going to hear  
9 from Mr. Randazza.

10 Did I say that right? Randazza or Randazza?

11 MR. RANDAZZA: Either one is okay, Your Honor.

12 THE COURT: Which way do you --

13 MR. RANDAZZA: Randazza. The Z is as in pizza.  
14 Randazza.

15 THE COURT: Thank you.

16 MR. RANDAZZA: Sure.

17 Yes, Your Honor, our motion is quite similar so  
18 I'm not going to run over any of the same ground unless Your  
19 Honor would like to do that.

20 I would like to pick up with perhaps some of your  
21 questioning of Ms. Yost when it came to what is this test,  
22 because a number of years ago we had, of course, Calder vs.  
23 Jones, the Supreme Court test that said that personal  
24 jurisdiction was reasonable in a defamation case. In that  
25 case because Ms. Jones lived in California, and the National

1 Inquirer was in Florida, but they knew that Ms. Jones lived  
2 in California, but also the focal point of her life was  
3 centered in California and the focal point of her industry  
4 was centered in California.

5 I believe that this case would not rise to the  
6 Calder level, but we have a higher standard here in the  
7 Tenth Circuit, and we have a higher and more developed  
8 standard now just over the past couple of decades. The test  
9 here essentially was developed from a Fourth Circuit case  
10 called Young versus New Haven Advocate which had some  
11 similarities. The New Haven Advocate wrote an exposé on  
12 prison conditions in a certain prison in Virginia. Now,  
13 with that fact pattern -- Young, just for the record, is 315  
14 F3rd, 256, Fourth Circuit, 2002.

15 Now, in that case you might say, well, how could  
16 The New Haven Advocate not have known that Mr. Young worked  
17 at this certain prison in this certain town inside of the  
18 confines of the State of Virginia? Well, they did, but that  
19 is not really what Calder was about and Young versus The New  
20 Haven Advocate made that clear. You are not saying is the  
21 story merely about Virginia? It is are you targeting  
22 Virginia with the allegedly tortious activity? Perhaps if  
23 it were, I would say a newsletter for the sheriff's union in  
24 Virginia, that would be targeting that audience.

25 So the Tenth Circuit in Dudnikov versus Chalk and

1 in Shrader versus Biddinger relied on Young versus The New  
2 Haven Advocate and made it clear that this circuit has a  
3 Calder plus test. You really have to be doing something  
4 else. They said in Biddinger that there needed to be  
5 indications that a defendant deliberately directed its  
6 message at an audience in the forum state and intended to  
7 harm the plaintiff occurring primarily or particularly in  
8 the forum state.

9 Perhaps if this were a story about Senator Hatch  
10 and aimed at this hometown, aimed at an audience here trying  
11 to get them not to vote for him, for example, that, I say,  
12 would probably satisfy the test. But what we have here is  
13 we merely have a review cite talking about dozens of  
14 companies.

15 To direct this to the factual inquiry that you had  
16 with Ms. Yost, before this case, yes, Purple was actually  
17 rated quite well on the cite. In fact, there is evidence in  
18 the record from our prior hearing that Mr. Monahan or Honest  
19 Mattress Reviews promoted Purple. Purple had a kick-starter  
20 campaign in order to raise money to create a new product.  
21 Mr. Monahan, prior to believing that there was any question  
22 here, actually promoted that product and promoted that  
23 campaign to help them fund raise. He didn't do that for  
24 pay. He just did it because he believed that this was a  
25 company he wanted to support. He liked the company before



1 he made the one inquiry, what is this powder?

2 Now, when he made the inquiry and he got the  
3 runaround, he started to get suspicious. Now, I don't know  
4 if I would have done the same, but that is not the question.  
5 If a journalist asks someone a question and they are evasive  
6 about the answer, that tends to be like chum in the water to  
7 a journalist. That is what started to hurt their ratings,  
8 that they were not being transparent about what was there.

9 Now, a lot of this that we're looking at is new  
10 evidence created after the fact and after the suit. I don't  
11 really see anything that is specifically problematic when a  
12 journalist gets sued and then decides perhaps this company  
13 is suing me to silence debate on their product, that maybe  
14 there is something wrong with the value of that product.

15 We also talked about and we see in the record that  
16 they have now produced somebody who came to the conclusion,  
17 in their opinion, that the powder is not dangerous, in  
18 conflict with our expert who says it very well might be.

19 Now, this is not a products liability case. I  
20 don't need to prove that there is something wrong with this  
21 powder and that it could cause health problems. However, I  
22 can say that after talking to our expert, I wouldn't put my  
23 children on it. It does have what is known as  
24 nanoparticles, particles that are of such a small diameter  
25 that they will pass into the bloodstream. Now, that is

1 something, whether it is dangerous or not, even if it is  
2 helpful to your health, wouldn't a consumer want to know  
3 about that? That is the nexus of all of this. I don't see  
4 anything here, and if we were aiming at perhaps the skiing  
5 industry out here, then that would be a different story, but  
6 here you don't have that.

7 What we do have are three defendants, all in  
8 Florida. What we do have also are two more parties that are  
9 in the mix now that are also based in Florida. They are not  
10 defendants, but they have been served with subpoenas. I  
11 have at least been served with one letter objecting to the  
12 subpoena from an attorney in Florida. I have heard nothing  
13 from the other ones.

14 Now we have five parties in Florida. I am sorry,  
15 Your Honor, we have six parties, because we're also adding  
16 this former employee of GhostBed, so now we have six parties  
17 in Florida that all have some connection to this, a Delaware  
18 corporation with a facility in Alpine, Utah.

19 If we look at this Calder plus test that the  
20 Circuit here looks at, I don't think that we have the  
21 specific aiming that you need in order to satisfy it. Now,  
22 of course, Your Honor has a choice to make, whether if the  
23 motion is well taken or not, to either dismiss the case and  
24 let them refile it or to transfer it. I think that would be  
25 more to the 12(b)(3) argument that venue is certainly much

1 more proper in south Florida, for the very reason that we do  
2 have these now five or six parties that are going to be  
3 involved in discovery disputes and that have to be deposed  
4 and that have to be responding to this case, and I don't see  
5 what we are doing out here, as lovely as it is.

6 Now, the other issue that I would like for Your  
7 Honor to take into account is the supplemental authority  
8 that was submitted. The Bristol-Myers case -- we are not  
9 just looking at the old Volkswagen test of fair play and  
10 substantial justice, that speaks to an equitable analysis,  
11 but in Bristol-Myers, 137 Supreme Court, 1,773, very recent,  
12 it instructs us that the issue is not one of mere equity but  
13 one of federalism. I think that that is probably an even  
14 more important principle than we have here, because if we  
15 change our seats and we look at this through the eye of  
16 federalism, and we think about any consumer review cite  
17 anywhere in the country, would it have to per se be subject  
18 to jurisdiction being sued anywhere that it reviewed  
19 anything if that is where that item was perhaps  
20 manufactured?

21 So a health magazine that talks about maple syrup,  
22 are we all going to Vermont for any case involving that if  
23 there is a dispute over that? Any car manufacturer, and if  
24 anybody wants to write about the Tesla they are going to go  
25 to northern California whether they like it or not.

1 Meanwhile each individual in each individual state has a  
2 certain degree of free speech protection that they are  
3 accustomed to because they are in that separate sovereign,  
4 they are within the confines of that state.

5 Now, here we have a bit of a choice of law issue  
6 to look at, because in this case I think the most  
7 significant relationship to this matter would be Florida.  
8 The Lanham Act analysis is going to be the same anywhere,  
9 but the defamation analysis, I think that this Court would  
10 likely see that the choice of law should be Florida.

11 We have a slightly different standard in Florida  
12 and we have slightly different requirements in Florida. We  
13 have an anti-S.L.A.P.P. in Florida. Just recently there was  
14 the Diamond Ranch versus Filer case from this very court  
15 that said that the California anti-S.L.A.P.P. law would be  
16 applied to a defamation case in this state when you had an  
17 out of state defendant.

18 So given all of those issues, and if we look at  
19 the federalism issues, I think it makes it clear that even  
20 if Your Honor were to find that somehow this case gets over  
21 this Calder plus test, that federalism would require a  
22 transfer at the very least.

23 THE COURT: Thank you, Mr. Randazza.

24 MR. RANDAZZA: Thank you, Your Honor.

25 THE COURT: Mr. Mableby.

1 MR. MAGLEBY: Thank you, Your Honor.

2 As the Court has noted, there have been some  
3 important and critical developments since the last time we  
4 were here, and so upon the discovery of substantial  
5 additional evidence and upon obtaining the as yet  
6 unchallenged safety studies proving that Purple's products  
7 are safe and that Mr. Monahan's messages are false, we filed  
8 the second T.R.O. and preliminary injunction motion, which  
9 addresses the concerns that you have now summarized for us  
10 that you had in dissolving the original T.R.O.

11 We are in a completely different universe, but  
12 then after we filed the second injunction motion, something  
13 pretty incredible happened, and that is GhostBed's former  
14 employee reached out to us through her uncle who is a  
15 lawyer. We did not talk to her about anything substantive.  
16 In fact, I am not sure we talked to her at all until after  
17 she had left GhostBed.

18 She has an incredible story to tell. She confirms  
19 the kinds of things that in most cases are never  
20 demonstrated by evidence, because people hide and lie about  
21 them and people keep these kinds of things out of writing.  
22 Let's remember that Ms. Anderson was GhostBed's director of  
23 marketing. She was in fact identified by GhostBed in Marc  
24 Werner's declaration, which you talked about in paragraph  
25 six, which he filed in March of 2017, and which clearly the

1 Court gave the benefit of the doubt to when the Court  
2 dissolved the T.R.O.

3 She comes forward and says I quit because I didn't  
4 want to lie. GhostBed's C.E.O. had me destroy and hide  
5 evidence. GhostBed's C.E.O. has lied to the Court. She got  
6 her hands on Mr. Werner's declaration. We didn't give it to  
7 her. That caused her a great deal of concern, including  
8 also the fact that Mr. Werner was attributing everything to  
9 her as the director of marketing when, in fact, Mr. Monahan  
10 is the one that ran the show.

11 There is so much new evidence relating both to the  
12 T.R.O. and to the motion to dismiss that it is hard for me  
13 to summarize, but let me put it into an if then hypothetical  
14 that applies to all of the motions.

15 So if a competitor conspired with its employee or  
16 its consultant to create a fake website which claimed to be,  
17 quote, independent and unbiased, with the purpose of the  
18 site to knowingly make false statements about things like  
19 cancer and poison and inhaling poison and asthma, and then  
20 on top of that to go out and launch a concerted attack  
21 across social media, pushing that false message, generating  
22 hundreds of thousands or in one case I will talk about, Your  
23 Honor, 1.7 million impressions with the goal of harming the  
24 competitor, and if those same parties conspired to conceal  
25 and destroy evidence of the connection, and if those same

1 parties submitted false statements to the Court, then would  
2 there be jurisdiction? Would a plaintiff be able to state a  
3 claim? Would there be grounds for a T.R.O. or an  
4 injunction?

5 Of course the answer to all of that is yes. I  
6 pose that hypothetical because I am going to miss something  
7 in this discussion, and I kept saying to myself how do I put  
8 this all into one package that is easy to understand? If  
9 you look at it through that framework, everything is pretty  
10 quickly decided.

11 Now, the three motions to dismiss, and I thought  
12 they were tough motions when the defendants filed them, and  
13 with the newly discovered evidence, the facts and the law  
14 are just so clear that we do have jurisdiction at this early  
15 stage, and it is clear to me that Your Honor understands  
16 this very well down to paragraph six of the Werner  
17 declaration. So I am facing that situation when I know that  
18 the Court is very, very familiar with the facts, but I am  
19 compelled to run through some of them because this is an  
20 extremely important issue for my client. If you do not find  
21 jurisdiction, then we do not get to the merits of the  
22 preliminary injunction motion, and the defendants will have  
23 succeeded in buying themselves another 30, 60, 90, 120 days  
24 in which to continue to do horrendous damage to my client.

25 We see this as essentially a bet the company case.

1 I will talk about that when I talk about the irreparable  
2 harm, because it has gotten so bad that it is magnitudes  
3 worse than it was the last time we were here.

4 Let's talk about jurisdiction. The first big  
5 point, of course, is that Ms. Anderson's declaration is a  
6 game changer. We have new evidence of a conspiracy to harm  
7 Purple, to hide and destroy evidence, to mislead the Court,  
8 to intimidate and threaten witnesses and essentially suborn  
9 perjury.

10 What Ms. Anderson has done is she has not only  
11 confirmed evidence that was before the Court but, as you  
12 pointed out, she also confirms the allegations, and she  
13 confirms the inferences that we were going to ask you to  
14 draw in denying the motion to dismiss and granting the  
15 preliminary injunction, which you can do. The Court can, of  
16 course, draw reasonable inferences, particularly in  
17 situations where as here nobody is going to admit to what  
18 they did. That is what circumstantial evidence is all  
19 about. She has actually confirmed a great deal of that.

20 Let me walk through some of the points in Ms.  
21 Anderson's declaration and we'll talk about the significance  
22 to these issues. The first and the incredible thing that I  
23 want to talk about is paragraphs 25 to 30 where she details  
24 how GhostBed tried to destroy and hide evidence. Here is  
25 the really interesting thing, Your Honor. They have had



1 this for about ten days, so a long time, and Mr. Werner has  
2 not submitted a declaration contradicting Ms. Anderson in  
3 any way or attempted to explain it away.

4 Frankly, I was surprised. I expected we would get  
5 a declaration which I was pretty sure would be packed full  
6 of lies, but I thought we would get that. And then it  
7 occurred to me that because Mr. Warner had already perjured  
8 himself, and we have proof of that, and because GhostBed's  
9 lawyers are now retreating from some of the statements,  
10 including in particular the one that you pointed out, and  
11 they retreat from it in footnote one of their reply, and  
12 maybe Mr. Warner made a calculation and said Ms. Anderson's  
13 declaration was really bad for us, but, holy cow, if I  
14 submit another false declaration I might actually get in  
15 real trouble. My point to the Court would be he ought to be  
16 in real trouble.

17 He does not deny what Ms. Anderson says about  
18 destroying or hiding the evidence and telling her to scrub  
19 Mr. Monahan's presence from the Internet, which we had  
20 already discovered and presented to you, which they tried to  
21 point out was something innocent, and then confirming that  
22 this was with ill intent when he asked for a list of the  
23 vendors internal to GhostBed and says scrub his name from  
24 that.

25 They have this argument of, gee, it was an

1 accident when Mr. Monahan said this to the public. Well, if  
2 that is just a mistake in what you say to the public, okay,  
3 maybe you go and scrub it from the public, and I don't think  
4 you really do, but why would you need to scrub it from the  
5 internal documents? Because GhostBed is in a lawsuit with  
6 Casper and Mr. Werner is a sophisticated litigant and he  
7 wants to hide that evidence and he tells Ms. Anderson Ryan  
8 does not exist.

9 Note the timing. It is shortly after she starts  
10 and about the same time that he launches the Honest Mattress  
11 Reviews website because they know what is coming.

12 Ms. Anderson goes on to talk about the false  
13 statements made by Mr. Werner. I will talk about those in  
14 conjunction with the injunction motion. There are also  
15 additional false statements that have been given to the  
16 Court.

17 She also talks about how Mr. Werner threatened to  
18 sue her without mercy. I'm not a criminal lawyer, Mr.  
19 Kaplan is and maybe I will ask him, but to me it sounds a  
20 lot like witness tampering or suborning perjury. He is  
21 basically saying to you keep your mouth shut.

22 Then, contrary to what GhostBed has represented to  
23 the Court, she confirms not only that Mr. Monahan was the  
24 marketing guy at GhostBed, but that he currently is. I  
25 expected their argument was going to be, well, he has not

1 been around since October, but he has been around and he  
2 comes to the office. Then contrary to what GhostBed told  
3 this Court, Mr. Monahan created the blog post about the  
4 injured GhostBed employee, and she identifies that the  
5 Achieve relationship, which Ms. Yost talked about at the  
6 last hearing and, oh, gee, there is this separation and we  
7 have these different entities, and he is really a  
8 consultant, that that actually has been maintained as a scam  
9 to hide Mr. Monahan's direct relationship with GhostBed and  
10 as a defense to the Casper lawsuit.

11 Then contrary to paragraph six where Mr. Werner  
12 tells you under oath that I have no affiliation whatsoever,  
13 I mean, these are words without wiggle room, right, and then  
14 Mr. Monahan goes to dinner at Marc Werner's house and they  
15 talk on the phone every day and he provides all of these  
16 services to GhostBed.

17 She believes that Mr. Monahan is paid under the  
18 table because Mr. Werner complains about what Achieve pays  
19 him and gives Mr. Monahan credit for the success of the  
20 company and Purple is a constant topic at the company. Mr.  
21 Werner goes on tirades about the powder to the employees,  
22 about how it is talc and it causes cancer, which is, of  
23 course, undeniably false.

24 Then, lo and behold, as we'll talk about, GhostBed  
25 employees are telling people in chat messages that Purple's

1 products cause cancer and cause them to cough up blood. Why  
2 is that relevant to the jurisdiction motion? Well, because  
3 if you are engaged in a conspiracy, all of the contacts of  
4 your co-conspirator are attributed to you. So Mr. Werner  
5 has very cleverly, carefully and consciously tried to  
6 separate himself from Mr. Monahan. We cite to you a couple  
7 of cases, one from the District of Kansas and the other one  
8 from the District of Mexico that say, look, if you're a  
9 co-conspirator and your contracts are attributed to the  
10 other co-conspirator for obvious reasons --

11 THE COURT: You need to slow down.

12 MR. MAGLEBY: I'm sorry. I will.

13 THE COURT: Thank you.

14 MR. MAGLEBY: I get so nervous that I'm not going  
15 to get it all in and that I am boring the Court.

16 THE COURT: Did you say District of Mexico?

17 MR. MAGLEBY: Yes. The District Court of Kansas  
18 and the District of Mexico --

19 THE COURT: New Mexico.

20 MR. MAGLEBY: Sorry. New Mexico. No, I am not  
21 citing Mexican law. I can say I have never done that.

22 Okay. Slowing down.

23 THE COURT: Getting around to the jurisdiction  
24 issue --

25 MR. MAGLEBY: Yes.

1 THE COURT: -- and Mr. Randazza addressed it, and  
2 maybe better than Ms. Yost, but she addressed it too, but I  
3 need to know, okay, if I give you all of your ifs, and  
4 you're stating your case from your point of view --

5 MR. MAGLEBY: Yes.

6 THE COURT: -- but I need to know, and maybe these  
7 two cases will help me, but I need to understand this Calder  
8 plus test, which they are referring to, Calder plus.

9 MR. MAGLEBY: Sure.

10 THE COURT: If we assume everything that you're  
11 alleging is true, that Mr. Monahan was working directly with  
12 Mr. Werner and GhostBed to try to kill the competitor, which  
13 is the theory of your case --

14 MR. MAGLEBY: Yes.

15 THE COURT: -- and that competitor is  
16 headquartered in Utah. That is where Purple mattress is,  
17 right?

18 MR. MAGLEBY: Yes.

19 THE COURT: Even though they are a Delaware  
20 corporation, is that enough to bestow personal jurisdiction?  
21 I don't think that you have general jurisdiction so get past  
22 that. I don't think that that is even a close call.  
23 Personal jurisdiction is tricky always, and I don't know how  
24 many, but in 25 years I have probably dealt with -- well, I  
25 don't know, but dozens and dozens and they are always new.

1 You can take Calder versus Jones and take those facts, and  
2 every case is different it seems like when you get into the  
3 ones that get contested, but this is a little different, and  
4 Mr. Randazza frankly made a pretty good argument. He said  
5 that you're going to need something that does more than just  
6 target, and if I misstating him he will correct me, but --

7 MR. RANDAZZA: Yep.

8 THE COURT: You need more than just targeting a  
9 Utah based company.

10 MR. MAGLEBY: Yes. Sure. I'm happy to talk about  
11 that. What they are relying upon is the Dudnikov case, and  
12 they cite that at the start of their reply and the argument  
13 is the forum state must be the, quote, focal point of the  
14 tort.

15 THE COURT: The state, not the resident in the  
16 forum state.

17 MR. MAGLEBY: Forum state, right, must be directed  
18 to the forum state and then what is the something more, your  
19 question. I wrote that down.

20 Now, what is interesting is the defendants forget  
21 when they make that argument, or at least they do not  
22 discuss the facts and the outcome of the Dudnikov case.  
23 That case found jurisdiction. It found jurisdiction and, as  
24 you pointed out, the facts are always different and  
25 interesting and every case is different, but they found

1 jurisdiction based on facts that are substantially less  
2 compelling than the facts that you have here. What I was  
3 going to do was talk about the facts and then apply the law,  
4 but I am now going to talk about the law and then apply the  
5 facts. I will talk about the Dudnikov case.

6 In that case what happened is a defendant sent a  
7 cease and desist notice to eBay in California saying you  
8 need to cancel an auction for I think it was a print or  
9 fabric or something like that, and it was being sold by a  
10 California resident, and it was a small business that sold  
11 fabric through eBay. That was their business. By sending  
12 that cease and desist letter to California, it caused the  
13 cancellation of the auction in Colorado.

14 In addition, what that does is it puts a black  
15 mark on your record. So the Colorado business or persons, I  
16 don't know if they were individuals or not, filed a lawsuit  
17 in Colorado and the defendants made the exact same argument  
18 that they do here in this case. What the court said is,  
19 look, they knew the plaintiffs were in Colorado, and they  
20 intended that the auction would be canceled in Colorado, and  
21 they knew it was going to have consequences. What was  
22 missing, among other things, is all of the evidence of ill  
23 will, right, and conspiracy and false statements to the  
24 court and everything else that I will talk about. That was  
25 all missing.

1           What the court focused in on was the intent. If  
2   you look at page 1,078 of the Dudnikov case, and I love that  
3   name, by the way, it says that actions for the purpose of  
4   having consequences felt in the forum state are more than  
5   sufficient. So what they want to do is elevate this test  
6   into what is basically an impossible test, that somehow it  
7   is an attack upon the State of Utah before the State of Utah  
8   will have jurisdiction.

9           That is a vast overstatement of both the holding  
10   and the law in the Dudnikov case. The Dudnikov case talks  
11   about this in several places. I didn't think I would go  
12   into this level of detail but I'm going to. One of the  
13   arguments that the defendants made was, well, wait, the  
14   cease and desist letter went to California. That is where  
15   eBay was. We didn't really know they were in Colorado, nor  
16   did we intend the harm to be in Colorado, so Colorado is not  
17   the focal point.

18           The court rejected that and came up with something  
19   I thought was interesting and it is the backboard theory.  
20   You go to do a layup and you throw the ball up and you  
21   intend to hit the backboard, but you mean for it to go  
22   through the basket. They said, look, you send that to  
23   California but you know that it is going to have  
24   consequences in Colorado. The defendants in that case made  
25   the argument, well, gee, we didn't really know that they



1 were in Colorado. The Court said I find that hard to  
2 believe because you obviously found the site on the website  
3 and you tracked them down to know who they were, and if you  
4 had done any kind of an investigation you would have known  
5 they were in Colorado, but even with that fact dispute, the  
6 Court said I'm going to construe the facts in favor of the  
7 plaintiff, whether or not they made a prima facie case, and  
8 I am going to say you knew they were in Colorado.

9 Here they obviously knew that Purple was in Utah.  
10 We have set forth all kinds of evidence about that,  
11 including that they copied, cut and pasted videos and images  
12 from Purple's site about taking a tour of the mattress  
13 company in Utah.

14 Here are some other quotes from Dudnikov. In  
15 assessing the question of Purple's full direction, Calder  
16 stressed the fact that the Inquirer defendants knew that the  
17 brunt of the injury would be felt in the forum state. I  
18 think they also distinguish actually the case that --

19 THE COURT: Where did the cease and desist letter  
20 go, to a California company?

21 MR. MAGLEBY: It went to a California address. It  
22 went to eBay.

23 THE COURT: Right. As you were explaining the  
24 case I remembered it. I reviewed it in some significant  
25 detail in assessing another personal jurisdiction case.

1 Thank you.

2 MR. MAGLEBY: Yes.

3 Anyway, if you review Dudnikow what you will come  
4 away with is the conclusion that we clearly meet that test  
5 because what was in Dudnikov was far, far less significant.

6 Now, let me talk a little bit about some of the  
7 additional facts regarding the contacts that were not  
8 present in Dudnikov, but which further support jurisdiction.

9 In particular, Mr. Monahan and H.M.R. purchased  
10 Purple products from Utah. We have found that they bought  
11 at least one mattress on February 11, 2017. And, of course,  
12 they posted negative reviews about the mattress, and it is  
13 not surprising that you would buy something if you are going  
14 to review it. When I talk about the Diesel Power case that  
15 is an important fact, but this is actually pretty  
16 interesting.

17 Mr. Monahan started reviewing the Purple mattress  
18 on September 10, 2016. We don't have a record of him buying  
19 the product before that, so the conclusion you can reach,  
20 Your Honor, is that either Mr. Monahan bought more than one  
21 for purposes of his reviews and his attacks on Purple, or  
22 the reviews starting in September of 2016 were absolutely  
23 fake because he never had a product.

24 Now, there is one other possible explanation, and  
25 that is maybe GhostBed bought the mattress for him and gave

1 it to him, but under any one of those three circumstances,  
2 what you have is a situation of purposeful direction  
3 combined with at least one purchase but maybe more. Again,  
4 that becomes significant because the purpose is not  
5 unrelated to the causes of action. It is central to them  
6 and core to them.

7 In addition, he bought a Purple pillow and gave it  
8 a bad review. Again, we can't find a record of him buying  
9 it, so either he bought it under a different name and  
10 presumably he will say he bought it before he gave it a  
11 review, or else the review is completely fake and directed  
12 to Utah. Of course, as you pointed out, Your Honor, the nub  
13 of this is the false and misleading statements, the attacks  
14 on Purple in social media. We have got all of that, but we  
15 also have Mr. Monahan copying and pasting from Purple's  
16 website over and over and over again and using those images  
17 and the language to launch his attacks on Purple. They are  
18 core and central to his attacks.

19 He also, of course, re-posts take a tour through  
20 Purple's mattress factory in Utah. A sneak peek inside  
21 Purple's mattress factory in Utah. He says that he spent  
22 months trying to reach different members of Purple's team  
23 but to no avail. That is part of his argument, that Purple  
24 is nonresponsive. He uses that on his website to attack  
25 Purple.

1           One of two things is true. He either did make all  
2 of those phone calls, and then he is using that to harm  
3 Purple, or he is lying about making all of those phone  
4 calls, in which case his intent and ill will is directed  
5 specifically at Purple in the State of Utah. He recorded  
6 one call with customer service and he posted that on his  
7 site and talks about it.

8           Then, of course, there are the misleading posts  
9 about it and the Twitter communications, the posting on  
10 Purple's Utah based Facebook, and all of the social media  
11 attacks. Again, in one instance he has generated  
12 1.7 million hits. I will talk about that in the injunction  
13 motion.

14           On top of that, what else is new since we were  
15 here? Purple now has proof that we are losing sales and not  
16 just across the country but in Utah. We have Utah customers  
17 returning products or rejecting Purple's products. We have  
18 3,277 users in Utah visiting the H.M.R. website. Again, the  
19 website is now a tiny component of the attack that is being  
20 launched on Purple from multiple angles, but there are over  
21 100 different locations in Utah that have gone to that site.

22           He follows seven Utah based Twitter accounts. You  
23 say why is that important? Well, the reason you follow a  
24 Twitter account is because it gives you access to Twitter  
25 users who also follow those accounts. He chooses seven of

1     them in Utah because he wants Utah people to follow his  
2     accounts and his attacks on Purple.

3             So the overview I would say, Your Honor, is this.  
4     If the facts of our case don't establish jurisdiction, then  
5     you can never have jurisdiction over a defamation Lanham Act  
6     case that is based upon electronic communications. Not only  
7     is there no electronic communications exception, but there  
8     surely ought not to be one, because, let's face it,  
9     everything is going electronic these days and the law will  
10    adjust and adapt.

11            In fact, the law has. It did it, among other  
12    places, in Judge Nuffer's decision in 2015 in the Diesel  
13    Power case, which we cite, which might be the most analogous  
14    case in the country, but it is certainly the one we were  
15    interested in because it is from this district.

16            The facts of that case are you had a Tennessee  
17    defendant who purchased goods from a Utah company three  
18    times and made basically a few postings on the Internet, not  
19    on his website, but somewhere else on the Internet. A  
20    lawsuit was filed in Utah and a motion to dismiss was filed.  
21    What Judge Nuffer said is a completely passive website  
22    standing alone cannot give you jurisdiction just because it  
23    can be accessed from Utah. We don't have any quibble with  
24    that. But what Judge Nuffer said that was very interesting  
25    is he said, however, the purchase of products combined with

1     defamatory online posts can establish jurisdiction, and that  
2     is a minimal purchase, three products.

3             In this case Monahan purports to be reviewing all  
4     of these Purple products and, apparently, at least two  
5     mattresses and one Purple pillow, and then he got one that  
6     he cut into. He cut into a mattress and sent a piece of it  
7     to Dr. Godleski. Then he files a report with the C.P.S.P  
8     where he says sleeping on his mattress is hurting his  
9     asthma.

10            Of course he files that complaint before the  
11    February mattress was actually delivered to him, so he must  
12    have had another one and he must be sleeping on it, because  
13    that is what he tells the C.P.S.C., but that can't be the  
14    one he cut a piece out of, so now we are up to maybe four  
15    mattresses or four major, major lies. I don't know which  
16    one, but we would like to get some discovery and find out.

17            Judge Nuffer says, boy, this minimal amount is  
18    enough for me to exercise jurisdiction. Then Judge Nuffer  
19    goes on to say the limited contacts the defendant's website  
20    creates with Utah may be specific to give Utah specific  
21    jurisdiction over defendants in an injury arising from that  
22    website but not for unrelated injuries. So, in other words,  
23    if the website is causing the problem, then the website  
24    alone could establish jurisdiction. I think we are clearly  
25    there.

1 I would like to point out that Diesel Power  
2 considered and rejected the same Dudnikov argument that Mr.  
3 Randazaa advanced. The Court considered it in that context  
4 with far less significant contacts.

5 We cite a couple more cases which create  
6 additional issues, and it goes to what I have talked about,  
7 which is the copying of the website contents. We cite to  
8 the Kindig case and we cite to the Select Health case.  
9 Kindig was a Judge Parrish case. There were patent and  
10 copyright claims, but also Lanham Act unfair competition  
11 claims. There was an interactive website and the defendant  
12 went and copied content from the Utah website. What Judge  
13 Parrish said was copying that and putting that on your  
14 website, even though your website is passive and is not  
15 specifically directed to Utah, there is enough of a tie-in  
16 there that we have jurisdiction.

17 I think that what is interesting is that case  
18 included unfair competition claims which, of course, are  
19 akin to false advertising claims. There has been no  
20 response from the defendants about that, and certainly they  
21 have not denied that Mr. Monahan copied the heck out of  
22 Purple's website and are still doing it today.

23 In the Select Health case there was a similar  
24 analysis. The defendant copied content from a Utah based  
25 company and attached it to its website. I have more there

1 on the Schrader case, but I am just going to move on.

2 In terms of the arising out of and the but for and  
3 the proximate cause, just as the Diesel Power case said,  
4 look, these facts meet both of the but for and the proximate  
5 cause case, just as the Dudnikov case said, that you don't  
6 need to draw a distinction between the two of them. They  
7 are easily met in this case. Fair play and substantial  
8 justice are really almost a throw away argument in personal  
9 jurisdiction and jurisprudence. You have to have an  
10 extraordinary set of facts, or, as the Court said, a  
11 compelling case, that there is something so different about  
12 your case that it would not be fair even though there is  
13 jurisdiction.

14 Venue. Again, I think it is a throw away  
15 argument. The statute says if you have jurisdiction, then  
16 venue is proper. Then they ask you to transfer the case to  
17 Florida. Again, that is bordering on what I call a throw  
18 away argument, and I don't mean that pejoratively about the  
19 lawyers. I just mean it is not a great argument. What we  
20 all know is that you evaluate the location of the parties  
21 and the witnesses and the evidence and the inconvenience,  
22 but there has to be an overwhelming disparity before you  
23 would make that kind of decision.

24 What Ms. Yost said struck me, which is, gee, there  
25 all these contacts to Purple and the only thing in Utah is



1 Purple. The only thing in Utah? We have 700 employees. We  
2 do lots of sales here. Many, many of our witnesses are  
3 going to be here. There are going to be people from our  
4 customer service department. There are going to be people  
5 from the marketing department. We are going to have our  
6 C.E.O. testify. I mean, we'll probably have ten witnesses  
7 that are going to have to go into all of the harm that has  
8 been caused to the company and the actions that the company  
9 has taken. Our expert witnesses are here. Coincidentally,  
10 none of the defendant's lawyers are located in Florida.  
11 They have to get on a plane anyway.

12 What the case law says is in this day of  
13 electronic discovery and air travel, you need to have  
14 something more than that.

15 Let's talk about GhostBed.

16 THE COURT: Are you about done?

17 MR. MAGLEBY: I will wrap up in five minutes.

18 THE COURT: Okay.

19 MR. MAGLEBY: I get it.

20 In the first instance under the conspiracy case  
21 law that they have not challenged, what I have described  
22 establishes jurisdiction over Mr. Monahan and H.M.R. ten  
23 ways to Sunday. I mean, you could have a fraction of the  
24 contacts and you have jurisdiction. You attribute that to  
25 GhostBed, and eventually we're going to ask you to attribute

1 that to Mr. Werner and Ashley Werner when we move to amend,  
2 and you are going to have jurisdiction over all of them. We  
3 would have had that based upon inferences from the evidence  
4 that was in the record, but now we have the Ms. Anderson  
5 declaration and so GhostBed is in this case.

6 There is one other incredibly compelling set of  
7 facts which the defendants have not mentioned, and that is  
8 specific false statements from GhostBed targeted at Purple  
9 to cause harm that are indisputably false. By those I'm  
10 talking about the statement that Purple's products cause  
11 cancer and cause you to cough up blood. That came to our  
12 attention because somebody posted on Facebook, hey, I was  
13 having an online chat with GhostBed about Purple and they  
14 told me that your products caused cancer.

15 When that came in to what they call -- I don't  
16 know if it is the customer happiness department at Purple --  
17 it has a fun name -- one of the people there was so incensed  
18 that they immediately got online, and they didn't know that  
19 they were supposed to talk to lawyers before they do things  
20 like this, but they got online and, guess what, the very  
21 first contact they made with GhostBed is they had an instant  
22 message which came back and said they use baby powder in  
23 their mattresses which is now popping up as a hazard. Small  
24 traces of baby powder can cause cancer. Our managers had to  
25 inform us to let you guys know if asked, which is, of

1 course, entirely consistent with paragraph 24 of Ms.  
2 Anderson's declaration, which says that Mr. Werner talks  
3 around telling these things to the employees. How many  
4 other times did they say it where we didn't catch them,  
5 right?

6 So in the first try that is the reaction that we  
7 get. What Diesel Power says is just having the website be  
8 attached to the injury is enough to create jurisdiction.  
9 Well, these injuries arose from online chats, which are a  
10 lot like a website, and which would be enough to establish  
11 the injury. Certainly we have made the prima facie case.  
12 There is no denying that. It is in writing.

13 With that, Your Honor, what I would say is you  
14 should deny those motions and we should talk about the  
15 T.R.O. and the preliminary injunction.

16 Do you have any questions for me?

17 THE COURT: I don't have anymore. Thank you.

18 Responses? Ms. Yost, you can go first.

19 MS. YOST: Very quickly, Your Honor.

20 When Mr. Magleby stood up, the first statement  
21 that he made was that Your Honor should evaluate Ms.  
22 Anderson's declaration because it came to their attention  
23 through her uncle lawyer who contacted them after they filed  
24 their T.R.O. motion. Now, they filed that motion on  
25 May 24th. We have phone records, Your Honor, that show Ms.

1 Anderson talking to Mr. Magleby's law firm before that date.  
2 What we don't understand is we have not heard a thing about  
3 Ms. Anderson's testimony until a few days ago, so despite  
4 the months that have passed since their first  
5 communications, and we don't know when they started, and all  
6 we have, Your Honor, are phone records, that I am happy to  
7 give you a copy of, that show that she was talking to  
8 counsel while she was an employee at GhostBed before this  
9 motion occurred.

10 Now, Mr. Magleby tries to frame it so he can say  
11 that this fell in our lap very recently, Your Honor. That  
12 is why we are only giving it to you now. I think the  
13 evidence shows by these phone records that this information  
14 has been lying in wait. He questioned why Mr. Werner has  
15 not filed a declaration, since they filed this declaration  
16 from Ms. Anderson a few days ago. We had to investigate it,  
17 Your Honor. It was a five-day weekend. It was not exactly  
18 something where we had months and months to prepare, which,  
19 according to the phone records, Mr. Magleby did. I would  
20 suggest to Your Honor that the credence that counsel is  
21 asking you to give this testimony is higher than it  
22 deserves. I'm happy to give you the phone records if you  
23 are interested, Your Honor.

24 Other than that, if you have any questions, we'll  
25 be happy to address them.

1 THE COURT: I don't right now. Thank you, Ms.  
2 Yost.

3 Mr. Randazza.

4 MR. RANDAZZA: Your Honor, one, I think we have a  
5 dispute of law for you to resolve, and that is that as Mr.  
6 Magleby concluded his presentation he said he feels like he  
7 has at least gotten over the prima facie level. I disagree.  
8 But I think since we are considering evidence outside of the  
9 complaint and exhibits that burden shifts to a preponderance  
10 of the evidence, and I would rely on F.D.I.C. versus  
11 Oaklawn, 959 F2nd, 170, from the Tenth Circuit in 1992 for  
12 that proposition.

13 I, too, have some objections to this evidence.  
14 The declaration itself, which we also only recently got and  
15 I have not seen these phone records, and I would like to  
16 respectfully ask that we move these into evidence to show  
17 when this conversation first took place, but it is your  
18 evidence. I have not even seen these records yet, but if  
19 that is the case, that would raise another objection, but I  
20 would like to at least preserve that on the record if that  
21 is the case. We were surprised with this information when  
22 the opposition had it and was soliciting employees at  
23 GhostBed at the time and well before the motion was even  
24 filed and the ambush I don't think should be given credence.  
25 I would also like to object to the fact that it is nothing

1 but hearsay and speculation, most of it, just so that is on  
2 the record.

3 The thing that I see here that popped up in his  
4 presentation was this argument that we visited the website.  
5 Perhaps we did. I mean, this is something he raised in the  
6 more last minute filing that all of a sudden they have  
7 discovered the terms of service that somehow would bind us  
8 to a forum selection clause.

9 Now, in order to have a binding agreement somebody  
10 must know about the agreement, but we are being asked to  
11 believe that these terms and conditions, which are theirs,  
12 were so well hidden that even they did not discover them  
13 until last week, yet somehow Mr. Monahan and Honest Mattress  
14 Reviews should have found them and then read them and then  
15 agreed to them. I think we have already briefed the  
16 difference between browse-wrap and click-wrap, and if you  
17 would like me to go through that orally, I can do that, but  
18 I think that is pretty well laid out in our papers.

19 I wouldn't say that they were binding anyway, but  
20 if they are, and if we are going to credit this argument as  
21 being nonfrivolous, then why wouldn't my client's terms of  
22 service apply and my client's terms of service clearly say  
23 that jurisdiction and choice of law should be Florida.

24 THE COURT: Thank you, Mr. Randazza.

25 I am going to take a short break and then I will

1 hear the other motion, the motion for preliminary  
2 injunction.

3 At this stage I am inclined to find jurisdiction,  
4 but I want to read the Dudnikov case and take that under  
5 advisement. My inclination is that there is enough evidence  
6 that supports jurisdiction beyond the prima facie  
7 requirement, but I will take it under advisement. That is  
8 my inclination.

9 With that, I will take a ten-minute recess and  
10 give Ed a chance to get ready for your next rapid-fire  
11 talks. We'll be back in ten minutes.

12 Court is in recess.

13 MR. MAGLEBY: Thank you, Your Honor.

14 (Recess)

15 THE COURT: We'll turn now to the plaintiff's  
16 motion for preliminary injunction.

17 Mr. Magleby.

18 MR. MAGLEBY: Yes. Thank you, Your Honor.

19 I wanted to start briefly talking about the  
20 standard for likelihood of success on the merits, and in  
21 particular in light of you sharing with us today what your  
22 concerns were that led to you dissolving the T.R.O., and  
23 obviously we have substantial new evidence here. We had it  
24 and presented it when we filed the second motion for the  
25 injunction, and then we obtained the Calisha Anderson

1 declaration, which, by the way, we filed it within days of  
2 getting the information. There was no sandbagging here. It  
3 does not do us any good to do sandbagging.

4 What I wanted to remind the Court of --

5 THE COURT: Well, they have accused you of talking  
6 to her while she was still an employee.

7 Do you have a response to that?

8 MR. MAGLEBY: Yes. Ms. Greenwood reminds me that  
9 she had a short call with her at some point, which may have  
10 been then, and she is not a member of the control group so  
11 we are not worried about that. What we do know is that she  
12 didn't give us any substantive information at all and didn't  
13 talk to us about that until after she had left.

14 THE COURT: Who make that call, Ms. Greenwood or  
15 Ms. Anderson?

16 MR. MAGLEBY: In terms of downloading the  
17 substance of what went into the declaration?

18 THE COURT: No. Who made that call that  
19 happened --

20 MR. MAGLEBY: The first call?

21 THE COURT: -- while she was still an employee?

22 MR. MAGLEBY: I don't know if --

23 THE COURT: Did that come in to you or did it go  
24 out to her?

25 MR. MAGLEBY: The very first contact was I believe



1 from Ms. Anderson's uncle who is a lawyer. I think.

2 MS. GREENWOOD: Yes. Just to clarify what  
3 happened, he called me and he said she didn't want to talk  
4 or she thought she didn't want to talk until she had found a  
5 new job and she intended to find a new job. He gave me her  
6 number and I called her and we talked for a very brief  
7 period of time. She essentially confirmed what he said,  
8 which is, you know, I have got some stuff to tell you but I  
9 am not going to tell you anything. If we had had that  
10 information when we filed this motion that we're talking  
11 about right now, we certainly would have put it in as  
12 support for our claims.

13 THE COURT: Thank you.

14 MS. GREENWOOD: She later got a new job and she  
15 contacted us after that.

16 THE COURT: What do you mean that Ms. Greenwood is  
17 not part of the control group?

18 MR. MAGLEBY: Did I say Ms. Greenwood was not part  
19 of the control group?

20 THE COURT: Yes.

21 MR. MAGLEBY: She is part of my control group.  
22 Sorry. Ms. Anderson is not part of the control group.

23 THE COURT: What is a control group?

24 MR. MAGLEBY: A control group is somebody who  
25 makes decisions for a party.

1 THE COURT: You mean a control group for --

2 MR. MAGLEBY: GhostBed.

3 THE COURT: -- GhostBed. All right. Okay.

4 Go on with your motion.

5 MR. MAGLEBY: Anyway, getting back to the concerns  
6 that you had that led to the dissolution of the original  
7 T.R.O., just a reminder for all of us that we do not need to  
8 show a certainty of success. We cited to a couple of Tenth  
9 Circuit cases where likelihood of success is preliminary  
10 estimate and a party need not show a certainty of winning.  
11 However, I would say with the evidence that we now have in  
12 the record I think we do have a near certainty of winning,  
13 and if we did an evidentiary hearing, it would become even  
14 stronger.

15 There is also another thing I want to talk about  
16 in terms of the standard, and this is the first time I  
17 believe that we're going to meet this particular nuance,  
18 which is in the Tenth Circuit if the other three factors,  
19 other than the likelihood of success weigh heavily in favor  
20 of the injunction, then the test is actually modified and  
21 all we have to show is serious issues to be litigated and  
22 investigated. We cite to three Tenth Circuit cases, Greater  
23 Yellowstone Col and so on. What I'm going to do is actually  
24 spend some amount of time on those other three factors when  
25 I get to them.

1 But regardless of whether it is the higher  
2 standard or the lower standard we meet it, especially with  
3 all of the new evidence. I have broken it down into a  
4 number of categories. I think I have five or six categories  
5 of new evidence that I want to talk about. The first one is  
6 Ms. Anderson's declaration. I have talked about that and  
7 the high points of that and how surprising it is to actually  
8 have confirmation of what you suspect and what you thought  
9 you were going to have to go to trial on, the circumstantial  
10 evidence only.

11 As it relates to this motion, all of the things  
12 that Ms. Anderson sets out relate to credibility and they  
13 support all four of the factors, but there is one obvious  
14 point that jumps out, and I don't want it to get lost,  
15 because we spent so much time talking about the false  
16 statements, but it is Mr. Monahan's claims of objectivity  
17 and independence, and he promotes this through not just the  
18 website but all of the social media.

19 I am doing social justice. I am a do-gooder. I  
20 am concerned for your health. That is completely destroyed  
21 now. In fact, there is no disagreement that Mr. Monahan is  
22 there at GhostBed either in person or electronically working  
23 day in and day out and is the de facto head of the GhostBed  
24 marketing department.

25 THE COURT: Well, there might be disagreement.

1 Ms. Yost indicated that they have not had a chance to  
2 respond, or they have not responded because of the shortness  
3 of time --

4 MR. MAGLEBY: Sure.

5 THE COURT: -- and you want me to take everything  
6 that she says as true.

7 MR. MAGLEBY: Yes.

8 THE COURT: I have two competing declarations and  
9 they can't be squared, I will give you that --

10 MR. MAGLEBY: Yes.

11 THE COURT: -- but that does not mean everything  
12 that she said is true.

13 MR. MAGLEBY: True.

14 Do you know what, Your Honor, we're happy to have  
15 an evidentiary hearing if we need to if you have any  
16 concerns about us meeting the burden. I would love to have  
17 Mr. Werner on that stand. I'm sure you have some questions  
18 for him as well.

19 The point is this. What Ms. Anderson gives us is  
20 what was demonstrated by the evidence already in the record  
21 by the fact that they tried to scrub Ms. Monahan's role as  
22 GhostBed's chief brand officer and all of the other stuff.  
23 Mr. Monahan is not objective. That is and constitutes false  
24 advertising.

25 You don't have to take my word for it. The F.T.C.

1 says it and numerous cases say it. They say it is false and  
2 misleading and a violation of the Lanham Act to falsely  
3 claim independence and make a full disclosure, especially if  
4 you purport to be a review site.

5 The F.T.C. guidelines are at 16 C.R.F. Sections  
6 255.0 to 255.5, and they say if there exists a connection it  
7 must be, quote, fully disclosed. Here we have of course  
8 more than a connection. They don't say it has to be an  
9 employer or employee connection it just says any connection.

10 Then we cite to you the Casper Sleep versus Derek  
11 Hales case, and Mr. Hales runs a mattress review site called  
12 Sleepopolis, where there were four separate statements of  
13 independence that were found to be actionable because they  
14 were not supported. And then we cite the Casper Sleep  
15 versus Mitcham case, holding that a false implication about  
16 an existing economic relationship when there wasn't one was  
17 actionable. Then we cite numerous cases that say the Lanham  
18 Act applies to a failure to disclose information if that  
19 failure to disclose is misleading, just as much as it would  
20 apply to an affirmative false statement.

21 That is really I think one of the most important  
22 takeaways from Ms. Anderson's declaration, is that this lack  
23 of independence and this tight relationship is incredibly  
24 misleading. Indeed, we know that because why wouldn't they  
25 just otherwise disclose it? Well, the answer is because

1 then people would not believe that Mr. Monahan was truly a  
2 do-gooder. That is one major portion of the relief that I  
3 will request in a few minutes.

4 The second category of new evidence is GhostBed  
5 going out and its customer service people telling consumers  
6 that Purple's products use talc powder and it causes cancer  
7 and leads people to cough up blood. The answer to that is  
8 that Mr. Werner does submit a declaration on that and he  
9 says, oh, gee, it was a new guy and it was an accident.  
10 Oops. Sorry. We didn't mean to. We don't do it again.

11 Well, the first problem with that is it was an  
12 accident that happened multiple times. We only have  
13 evidence of it happening two times, but it is pretty  
14 incredible that the very first time somebody from Purple  
15 initiates a chat with GhostBed, they get the same story that  
16 was told in the Facebook post, and then how many other times  
17 did it happen before then, and did it happen after that and  
18 we don't know. They have not given us any documents.

19 The second problem is there is no declaration from  
20 this employee to say it was an accident and I was not told  
21 to do this. One wonders. Perhaps this employee, just like  
22 Ms. Anderson, was not willing to lie for the company and had  
23 concerns about that and that is why it has to come from Mr.  
24 Werner, because what this employee would say is, well, wait  
25 a minute, Marc, you talk all the time about how Purple's

1 products cause cancer. You're management. Remember what  
2 was said in that online post is pretty telling. Our  
3 management had to inform us to let you guys know if asked.  
4 That is not equivocal or reflecting a misunderstanding by  
5 this employee who presumably had some training in how to  
6 interact with customers in an online chat.

7 Then the third problem, of course, is this idea  
8 that it is an accident is kind of destroyed by Ms.  
9 Anderson's declaration where she says Mr. Werner goes on  
10 tirades about the powder and tells people these things.

11 But, Your Honor, I have got the solution. If it  
12 is really an accident and GhostBed didn't mean it, then they  
13 should have no problem and no objection to an entry of an  
14 immediate order that says they shouldn't do it, just to make  
15 sure there are no more accidents, right? It is not a big  
16 deal because it says don't do that which you have said that  
17 you will not do.

18 We, of course, would also like GhostBed to produce  
19 any documents regarding these statements, because we wonder  
20 how many other people were told the same thing. If you have  
21 any concerns about the jurisdiction motion, which I would  
22 suggest you do not need to have after you read Dudnikov,  
23 then we would like to do additional jurisdiction discovery  
24 and find out how many other people GhostBed has told that  
25 you can get cancer or you're going to be coughing up blood.

1           The next category of new evidence that I think is  
2           very important are the false declarations and  
3           representations submitted to the Court. I want to pose  
4           another hypothetical. I started with my grand hypothetical  
5           and let me pose a more narrow one, which is is it a serious  
6           matter to submit a false statement under oath to the Court  
7           or to misrepresent a fact in a pleading to the Court?

8           With regard to Ms. Anderson's declaration,  
9           remember that she quit her job because she wanted to avoid  
10          being asked to lie. She was very concerned when she saw Mr.  
11          Werner's declaration. She got her hands on it and that was  
12          the driving force. She affirms the falsity of Mr. Werner's  
13          declaration, which, although she did not specifically talk  
14          about Mr. Monahan's declaration, also confirms the falsity  
15          of Mr. Monahan's declaration. There is not one, not two,  
16          not three, but there is actually instances where they have  
17          told you something that is not true, which is frankly, even  
18          in my short 19 years, a shocking level of dishonesty.

19          What I think is very troubling, and perhaps is  
20          troubling to the Court and, in fact, you said it earlier  
21          this morning, that the Court relied upon those statements  
22          when it dissolved the T.R.O. So this is not a no harm, no  
23          foul kind of situation. It made a material difference to  
24          the case and as a result of that our client has been harmed,  
25          as I will talk about to a great degree.



1           The first false statement is on March 9, 2017  
2   GhostBed represented to the Court, quote, Monahan has never  
3   and is not -- that is a typo -- is not worked for GhostBed  
4   in connection with any competitive marketing concerning  
5   Purple or anyone else. That is an unequivocal statement.  
6   Never, any and is not are absolute terms. The new evidence,  
7   and these are e-mails, and this is not from Ms. Anderson,  
8   proves that these were demonstrably false. There are  
9   e-mails with Mr. Monahan, Ashler Werner and Marc Werner  
10   talking about advertising, a blow to Purple.

11           In fact, in one of them he e-mails Mr. Werner for  
12   permission and he says in it I wanted to ask you before I  
13   get us in trouble, right, because he knows they are going  
14   after Purple, and he knows it is going to hurt, and he knows  
15   that he is treading on a thin line. He talks about our  
16   comparison and making fun of Purple and so on and so forth.

17           After we caught them in their reply, footnote one,  
18   GhostBed tries to quietly retreat and says, oh, we withdraw  
19   the statement. Well, that is great. Withdraw the statement  
20   after all of the damage has been done. What that tells you  
21   is it was not true in the first place and it reflects poorly  
22   on their credibility.

23           The second false statement you have honed in on,  
24   and it is paragraph six, and Mr. Werner says GhostBed does  
25   not have any affiliation whatsoever with co-defendants

1 Honest Mattress Reviews or Mr. Monahan. Again, any and  
2 whatsoever are absolute terms. The same evidence and the  
3 e-mails that I'm talking about demonstrate it was not true.  
4 Not only is there an affiliation, but they are working on  
5 competitive marketing against Purple.

6 Then, of course, Ms. Anderson comes forward in  
7 paragraph 45 and says my employer was lying about Monahan's  
8 work and relationship with the company and she says the no  
9 affiliation statement is false.

10 By the way, here is something I thought was  
11 interesting. Evidence that would have shown those  
12 statements are false, that is same evidence that Mr. Werner  
13 had her scrub and destroy. Maybe he felt comfortable making  
14 those statements because he knew he had told Ms. Anderson to  
15 go and take Ryan Monahan's name off of the vendor list and  
16 we were not going to find it in discovery. Maybe that is  
17 why he was willing to be so bold. The reason we don't have  
18 a declaration from him today is because he is no longer  
19 willing to be so bold, because he knows there is at least  
20 one brave witness who he has threatened to sue without mercy  
21 and who is willing to stand up to him.

22 The third thing is the denial of Mr. Monahan  
23 having a GhostBed e-mail address. That, of course, is  
24 disproved by the fact we found e-mails online where people  
25 would post responses from Mr. Monahan using the e-mail

1 address. Then GhostBed produced a couple of e-mails that  
2 say ryan@ghostbed.com, but they only agreed to produce  
3 e-mails that have the word Purple in them. We said, hey,  
4 you have taken this position with the Court, but we would  
5 like all of the e-mails for ryan@ghostbed.com. Guess what?  
6 They refuse to give them to us.

7 Ms. Anderson puts the nail in the coffin when she  
8 said he uses it all the time. Then, of course, in reply  
9 they try to retreat again. It is like the old, oh, that  
10 e-mail address. Do you mean that e-mail address? Yes, he  
11 did use that one. But, again, it is after the Court has  
12 relied upon these incorrect statements to the Court.

13 The fourth is where they say that calling Monahan  
14 the chief brand officer was a mistake and Mr. Monahan was  
15 not authorized to do that. I think that is paragraph 14 of  
16 Mr. Werner's declaration. Mr. Monahan at one time  
17 mistakenly identified himself on Twitter and LinkedIn as  
18 chief brand officer. Now, they said that because we had  
19 Twitter and LinkedIn documents. But I guess Mr. Werner  
20 didn't know that we had our hands on e-mails where he  
21 identifies himself as that. Then, of course, they produced  
22 a couple that I believe show that. They have refused to  
23 produce additional e-mails which I bet say chief brand  
24 officer. Then Ms. Anderson puts the nail in the coffin and  
25 says this is not true. Werner and others at GhostBed knew

1 he used that title and encouraged him to do so. Then they  
2 make the claim that Mr. Monahan was not the chief brand  
3 officer. So one false statement is that it was a mistake  
4 and then the other one is he is not the chief brand officer.

5 Well, wait a minute. He is on e-mails that are  
6 being copied to others within the company and nobody within  
7 the company said, hey, by the way, Ryan, you gotta change  
8 your e-mail footer. It is not correct and you forwarded an  
9 e-mail exchange that you had with a customer.

10 Then the sixth false claim is they claim that the  
11 sleep team wrote the post about the injured employee and it  
12 wasn't really him. The evidence we have presented are the  
13 postings we discovered online, and then we present the  
14 evidence that they changed the postings and altered it to  
15 say the sleep team.

16 Then we found a whole bunch of old posts and blog  
17 articles, because you post blog articles to drive traffic to  
18 your site, on GhostBed's site in the archives where Mr.  
19 Monahan is identified as writing them and now it says the  
20 sleep team.

21 Here is the question, Your Honor. Where is the  
22 declaration from the sleep team? Where is the declaration  
23 from the person that actually wrote those articles? Is that  
24 somebody else who is not willing to lie for the company? So  
25 the conclusion is that the defendants have perjured

1 themselves and the lawyers have walked right up to or past a  
2 line that they should not have walked on. Then why lie  
3 about it? Well, the answer is because it is devastating to  
4 their core argument of independence if, in fact, Mr. Monahan  
5 has close ties to Mr. Werner.

6           You can and should consider credibility on an  
7 injunction motion. Just like in every trial I have ever  
8 done, there is an instruction to the jury that says, hey, if  
9 you find that a witness has willfully lied you can disregard  
10 some or all of their testimony as you wish. That is up to  
11 Your Honor.

12           The next new evidence are the safety studies. I  
13 want to be clear about something. Purple already knew that  
14 its anti-talc powder was safe. It conducted its own  
15 investigation. Its owners and founders are engineers who  
16 had made medical products that have been sold in the United  
17 States. They have patents on medical products. Striker is  
18 one of their clients. They conducted their investigation  
19 with the manufacturer and, lo and behold, the other thing,  
20 among the other things they learned, is that this powder has  
21 been used in cosmetics for decades. It is powder. It goes  
22 on the face. Guess what? People are not getting cancer and  
23 coughing up blood.

24           But to close the loop on that, because that was  
25 the challenge that was given to us, we had Dr. Michael

1 Lumpkin, a Ph.D. board certified toxicologist that works  
2 with the E.P.A. and the C.D.C. and the D.O.D., among other  
3 things, do studies. He came up with two big picture  
4 conclusions which are really important.

5 Number one, the powder is safer than the dust that  
6 you and I are breathing in this room, even if you sleep on  
7 the mattress every night for ten years, which is one of the  
8 challenges that Monahan put out on his website. You show me  
9 that this is safe to breathe for ten years and I will  
10 retract my statements. Okay. We took the challenge and we  
11 showed him but he has not retracted the statements.

12 The second conclusion is that Dr. Godleksi's  
13 critique is no critique at all. We have the safety studies,  
14 safe for asthma, safe for the most sensitive person, safe by  
15 the E.P.A. standards and safe by the F.D.A. standards. Then  
16 we have Godleski, who said he was already highly suspect  
17 because he admittedly did not know anything about exposure  
18 levels, he didn't know what it was, he didn't do any of  
19 those kinds of tests, and Dr. Lumpkin comes back and points  
20 out all of these flaws, including that he did not conduct a  
21 toxicology analysis that the products are not dangerous, and  
22 this is my favorite one, that Dr. Godleski was writing about  
23 the wrong material.

24 The defendants offer no reliable response to that.  
25 Again, Dr. Godleski wasn't reliable anyway, but here is the

1 thing, Your Honor. They are touting and Mr. Monahan is  
2 touting through the Internet that I have a Harvard educated  
3 doctor and he is on retainer. Well, great. If he is on  
4 retainer why don't you have him respond to Dr. Lumpkin's  
5 report? He has not responded because he can't and certainly  
6 you have no evidence to contradict it. You can't get your  
7 expert to support you on this critical lawsuit?

8 By the way, we asked to depose Dr. Godleski. We  
9 wrote a letter and we said Mr. Monahan says he is interested  
10 in the truth. He says it all over his website. We would  
11 like to talk to Dr. Godleski. I mean, please, convince us  
12 that we are wrong and there is something that is not safe.  
13 I will tell you what, Purple is founded by real people who  
14 live down in Lehi who have 700 employees who are engineers  
15 and who have made medical products, and if their product is  
16 not safe they want to know about it. Okay. Tell us. Give  
17 us some evidence. They refused to let us depose him.

18 So what do they come back with? I love this. I  
19 have never seen this. They come back and cite to an  
20 anonymous post on reddit, and they say, aha, somebody on  
21 reddit has disproven the safety studies. Then Mr. Monahan  
22 takes that and he puts it on the website and he blasts it  
23 out on social media as though it is some kind of expert.

24 The problem is we don't know who posted it. We  
25 don't know their qualifications. We wonder, is it Mr.

1 Monahan posting a fake posting so that he can then claim it  
2 is somehow independent? That seems to be his modus  
3 operandi. I am independent. I am trying to get to the  
4 bottom of the truth.

5 Do you know what, Your Honor, if the reddit post  
6 and the critique was so accurate and it was so easy to tell  
7 that Dr. Lumpkin's study was not accurate, couldn't they  
8 just hand the reddit post to Dr. Godleski and have him  
9 submit a declaration that says, yeah, this is right?

10 The conclusion from that and the takeaway is, Your  
11 Honor, that all of the statements that they have made are  
12 now demonstrably false. I mean, they were demonstrably  
13 false before because they didn't have any evidence, but my  
14 point at the last hearing is this. You can't come out and  
15 say your product causes cancer unless you have evidence. I  
16 mean, I can't say, Coca-Cola, your product causes answer.  
17 Then Coke comes back and says no, it does not. Then I say,  
18 aha, the burden is on you.

19 The messages that are being conveyed, and I will  
20 summarize the list from the last hearing, cancer, poison,  
21 lawsuits, Johnson & Johnson, baby powder, safety,  
22 respiratory problems, asthma, administering a poison,  
23 deceitful business practices, lung and respiratory  
24 irritation, inhaling gasoline and so forth.

25 It is safe and the statements are false and they



1 didn't have any evidence to prove it was false when they  
2 first made the statements and they have no evidence now.  
3 Let me pause there. They didn't have the Godleski report  
4 when he made all of those statements either. Right? He  
5 made all of those statements before he had anything to rely  
6 upon other than his conversations with Mr. Werner. Boy, do  
7 you know what, I hate Purple, I hate this powder, we've got  
8 to go after them, it causes cancer.

9           One more thing on the safety issue. Mr. Randazza  
10 said I wouldn't put my children on it. Well, as long as  
11 we're going to talk about what we believe, I have put my  
12 father on it. I bought one for him. He is in an assisted  
13 care facility and he has neck and back issues. I bought him  
14 a Purple mattress. I am not worried about the safety  
15 issues.

16           Let's talk about the additional and expanded false  
17 statements. Let me start with this point. As soon as you  
18 dissolved the T.R.O., they put everything back up.  
19 Everything we talked about in the first hearing is back up.  
20 They then expanded the scope and the depth of the attack. I  
21 wonder if the Court thought I'm giving them the benefit of  
22 the doubt, and perhaps was thinking like we were hoping that  
23 maybe they would act a little bit responsibly and think more  
24 carefully about what it is they said. No. They were  
25 emboldened and they expanded both the scope and the depth of

1     their attack.

2             So now we are dealing with these statements being  
3     repeated on social media, YouTube, Twitter, Facebook, and I  
4     mentioned reddit and reddit is a social media website, and I  
5     had to learn about it from my children, and its users or its  
6     members can post content. In 2017, Your Honor, reddit had  
7     over 500 million users a month. Mr. Monahan posts one of  
8     these things and it ends up either on the front page or the  
9     trending page of reddit.

10            Mr. Monahan says he is very sophisticated with  
11     social media. He knew what he was doing. Purple calls that  
12     reddit Monday, because it was the equivalent of crashing the  
13     server for the customer service department. They were  
14     suddenly overwhelmed with people -- does your product cause  
15     cancer? Does it do all of these horrible things? What  
16     we're now seeing are what appear to be fake Facebook  
17     accounts and trolls. A troll is somebody who tries to stir  
18     up trouble on the Internet. Accounts from the midwest with  
19     no information and they are locked down and they are making  
20     all of these posts.

21            Now, Facebook is the kind of thing where you get  
22     on it but you want people to see you, right, and you want to  
23     interact with them. We have a group of these in one  
24     geographic location attacking Purple. We want to get to the  
25     bottom of that.

1           So today Mr. Monahan has generated literally  
2       hundreds of thousands of impressions across Twitter and  
3       across YouTube, because people post and they comment on this  
4       and they read it and they say things like I am not going to  
5       die for this mattress. Here is the one that is  
6       overwhelming, and that is Mr. Monahan has created a YouTube  
7       video that has 1.7 million views. So one of the things that  
8       Purple did which led to its success is called the raw egg  
9       test. If you go into YouTube and you search Purple, not  
10      even Purple Mattress, just Purple, the first hit on YouTube  
11      is this raw egg test video which has generated -- it is kind  
12      of funny but it also physically shows the mattress and how  
13      it works.

14           Well, Mr. Monahan has managed to get his YouTube  
15      video up as the second hit. It has 1.7 million views.  
16      Okay. 1.7 million people have viewed that. If you have  
17      auto play on YouTube, when you finish watching the Purple  
18      video it auto plays Mr. Monahan's video. One of the things  
19      that he does is he says I have scientific proof that their  
20      products are not safe and he waves around the Godleski  
21      report. Right. That is 1.7 million potentially lost  
22      customers. I will talk about that with the irreparable  
23      harm.

24           It now appears, we believe, that Mr. Monahan is  
25      doing what is called boosting, which is you pay money to

1 promote a message on Facebook or on YouTube or whatever.

2 You say to Facebook any time somebody searches mattress I  
3 want my ad to come up or I want my video to come up. Right?

4 That brings up the question why in the world would  
5 an independent review site boost its attack on a mattress  
6 company? It does not make money from doing that. It is  
7 paying money. So we wonder is GhostBed paying to boost  
8 this? Coincidentally we are wondering is GhostBed paying for  
9 the Godleski report? Is GhostBed paying for Monahan's  
10 lawyers? Remember that Mr. Monahan claimed poverty to you  
11 at the last hearing, submitting documents that said that the  
12 only income we make from this website is \$50 a day from  
13 Google AdSense. So where is he getting the money for all of  
14 these things? We have asked them to give that to us in  
15 conjunction with the jurisdictional discovery because we  
16 thought, hey, wouldn't it be pretty good evidence that he is  
17 not independent if GhostBed is paying his defense in this  
18 case? Do you know what they said? They said no. They  
19 didn't say it does not exist. They said we are not going to  
20 answer you and you can draw the inference from that.

21 Now, it gets worse. Mr. Monahan is posting false  
22 claims that Purple is making false Facebook posts, that  
23 Purple is having its customer service people go out and make  
24 fake postings pretending to be independent. What I love  
25 about that is they are implicitly endorsing the fact that it

1 is wrong and a big deal to claim that you are independent  
2 when you are not. Right? That is his attack on us.

3 We have submitted declarations from the people  
4 that he has identified that say I'm a Purple customer, and I  
5 was cutting and pasting from Purple's online response, and  
6 it was not that I am some secret person at Purple, this army  
7 of trolls.

8 The next disturbing thing that he has done is  
9 regarding the Consumer Products Safety Commission. So  
10 Monahan created a post that made it look like he was working  
11 with and endorsed by and affiliated with the government. He  
12 posts something, and it is T.R.O. motion Exhibit 13, Honest  
13 Mattress Review with the U.S. Consumer Product Safety  
14 Commission. Then he has got association with a series of  
15 tweets with the C.P.S.C. What he is trying to do is make it  
16 look like the C.P.S.C. is endorsing his attack on Purple and  
17 that the products are not safe and obviously he is not  
18 working with the C.P.S.C. That is very troubling.

19 Again, why does a mattress review site do this? A  
20 mattress review site is supposed to be reviewing mattresses.  
21 Now it is on this crusade.

22 Then there are the false statements that he has  
23 made to the Consumer Product Safety Commission under his own  
24 name. A couple of them have been filed which we think were  
25 him that are anonymous. Right? Then he does one under his

1 own name and he tells them his mattress is causing severe  
2 breathing issues. The mattress contains a powder that  
3 causes severe breathing issues and asthma. Well, at some  
4 point we're going to have to get his medical records and see  
5 if that is true.

6 Here is the problem with that. The dates don't  
7 line up. He ordered a mattress on February 11, 2016 and the  
8 C.P.S.C. complaint is March 2nd and the mattress was  
9 delivered on March 6th. The only other mattress that we're  
10 aware of is the one that he cut a piece out of to give to  
11 Dr. Godleski, so it makes you wonder did he order more  
12 mattresses before that? Was he just lying to the C.P.S.C.?  
13 It is not his mattress. It is kind of hard to believe that  
14 he is sleeping on the Purple mattress when he said all of  
15 these horrible things about it.

16 There are a number of other false statements.  
17 Consumers are getting sick daily. One of Harvard's most  
18 renowned doctors has confirmed that the anti-talc powder is  
19 dangerous. In no way has he confirmed that. He said if it  
20 is this substance and if you inhale too much of it, it would  
21 be dangerous. Well, Your Honor, if you stick your head in a  
22 bucket of water, water become dangerous. If you drink a  
23 little of it, you are okay.

24 It is a false statement that Purple is not  
25 addressing the powder at all. We have addressed it in nine

1 different ways. He just does not like the answer, and then  
2 he tells the world we're ignoring him, and then he says I  
3 have had many with C.O.P.D., chronic obstructive pulmonary  
4 disease, write to me saying how they are getting headaches  
5 and nosebleeds and feel ill.

6 Their response to this, when we pointed out to you  
7 that these statements are false, is not to come back and say  
8 they are true. They didn't submit anything to show that  
9 they were true. They didn't show these purported complaints  
10 he has. They argue that the First Amendment protects him.  
11 What the First Amendment does not do is protect false and  
12 misleading speech. We have briefed that before. Now you  
13 have the unrefutable evidence that he is anything but an  
14 independent reporter. He is not a reporter.

15 Here is the question. If GhostBed was directly  
16 publishing advertisements saying that Purple's products  
17 caused cancer, would it be actionable? Of course it would.  
18 Well, the evidence shows that that is essentially what is  
19 happening here.

20 Now, I guess they might make this argument that  
21 the C.P.S.C. complaint -- that is not really an  
22 advertisement and you can't hold me responsible for that.  
23 Well, I also think the Court might have that question so I  
24 want to address it. The first thing is it is just one more  
25 layer of evidence that shows the conspiracy and the depths

1 that he will go to and that he is not behaving like a  
2 mattress review site, because he is not.

3 In addition, Mr. Monahan is a smart guy. He knows  
4 that what might happen if he submits something to the  
5 C.P.S.C. is that it will be published. It will be published  
6 by the C.P.S.C. He puts that ball in motion. What he is  
7 really trying to do is manufacture evidence, because if the  
8 C.P.S.C. publishes this complaint, right, he is then going  
9 to take it and post it all over his website and push it out  
10 and imply that he is working with them and there actually  
11 will be no adjudication, no verification, no scientific  
12 study, nothing that reviewed it.

13 Here is the thing, and we cite the Grant Air Mask  
14 Corp case, the Southern District of New York, 1986, and it  
15 says liability for the Lanham Act, quote, Section 43(a)  
16 states that it extends to any person who knowingly causes a  
17 false representation to be used in connection with goods and  
18 services in commerce. If you file a report with the  
19 C.P.S.C. and you know they are going to publish it, you are  
20 meeting that standard and you are knowingly causing that  
21 false representation to be out there.

22 The final piece of new evidence, and this one is  
23 particularly important and galling to my client and I will  
24 explain why, is the repeated argument that Purple has not  
25 responded at all. Purple has not responded. You say, come



1 on, there is an argument that could be had, and maybe they  
2 have not responded the way he wants, he does not think it is  
3 honest, but, first of all, he is saying at all. It is not  
4 inadequate or not enough he is saying at all, and then he is  
5 promoting this narrative that Purple does not care about  
6 consumers and that they are non-responsive.

7 We have responded from day one. I remember when  
8 we were down here, you said to me, Mr. Magleby, if you have  
9 got the science why don't you just give it to them? I think  
10 you were, again, trusting them and giving them the benefit  
11 of the doubt. My view was I can't really trust them. I  
12 would like to get an order, because I can't really trust  
13 them the way they have already twisted stuff. Well, they  
14 continue to do that.

15 But now we have responded with safety studies and  
16 they continue to push this narrative. Why it is so annoying  
17 to my client is because you and I as lawyers can say, well,  
18 it is an argument of semantics as to what our response is,  
19 but the Internet cares. They care a lot about a company  
20 that is ignoring its consumers and the safety concerns, and  
21 that company's silence is evidence of guilt, and Purple gets  
22 all kinds of comments and communications to that effect.

23 Wrapping up with the likelihood of success on the  
24 merits, remember there are three ways that a statement can  
25 be false under the Lanham Act. Number one, of course, is it

1 can be literally false. That is easy. We have new evidence  
2 of abundant literally false statements. First of all, Mr.  
3 Monahan is not independent. Okay. That is his whole shtick  
4 and it is established that that is not the case and the  
5 F.T.C. says you have to make a full disclosure of any  
6 connection, so it does not say you have to be an employee,  
7 and he has not made that disclosure. In fact, he has made  
8 the opposite.

9 The second prong of literally false is established  
10 by the safety studies. GhostBed has literally said your  
11 products cause cancer and cause people to cough up blood.  
12 Mr. Monahan has literally said that Purple is fake posting  
13 on Facebook when it is not.

14 The second way you can be false under the Lanham  
15 Act is false by necessary implication, which is you don't  
16 actually say it, but the consumer will understand it as a  
17 statement of fact as readily as if you did say it. Your  
18 Honor, you are capable of reading those comments that we  
19 have put in front of you and determining that, but it is  
20 even better because we have the actual evidence now that the  
21 consumers are not viewing this as opinion as they would like  
22 you to believe.

23 Consumers are viewing it as fact. We put some of  
24 those pieces of evidence in front of you. Consumers are  
25 saying I'm glad I didn't buy that. Their products are

1 dangerous. Here is my favorite one, I am not going to die  
2 over this mattress. What message did that consumer get from  
3 Mr. Monahan's posting to say I'm not going to die over this  
4 mattress?

5 That reminds me of something I forgot to say. In  
6 the Diesel Power case the Court also found significant for  
7 minimum contacts that the plaintiff had alleged that Utah  
8 customers had returned products. I can't remember if it was  
9 an allegation, or if it was that one or two products had  
10 actually been returned, but if products were returned it was  
11 de minimis. We have now put in front of you the evidence of  
12 Utah customers who are saying things like I am not going to  
13 die for this mattress. Take this product back. There is  
14 another thing that we meet with Diesel Power and it is  
15 another thing that meets the focal point test of Dudnikov.

16 The third way that you can do a Lanham Act  
17 violation is if it is likely to mislead or confuse  
18 consumers. So if it is implicitly false, misleading in  
19 context, likely to deceive, including clever innuendo,  
20 indirect intimations and ambiguous suggestions, and we have  
21 that everywhere, but now we have evidence that that message  
22 is being driven home all over the place.

23 I mean, if you go on YouTube and you read the  
24 comments or reddit or Facebook or our customer service  
25 people, people are believing this. The false statements

1 fall into all of those categories.

2 Let me move on to irreparable injury. Let me  
3 recap. The Tenth Circuit has said that, quote, a showing of  
4 probable irreparable harm is the single most important  
5 prerequisite for the issuance of a preliminary injunction.  
6 Remember that that is just probable irreparable harm. It is  
7 possible that there would be irreparable harm. So query  
8 another if then kind of hypothetical. I guess it is not if  
9 then. What could possibly be worse than the false statement  
10 that a product causes cancer? I actually might have an  
11 answer to that, incredibly, and it is that products cause  
12 you to cough up blood. Right? That is what GhostBed  
13 literally said. By the way, anybody who has had cancer or  
14 had cancer in their family, that is a visceral gut reaction  
15 that they get, and anybody gets a visceral gut reaction to  
16 coughing up blood. I couldn't come up with something worse.

17 What the Lanham Act says is that false or  
18 misleading statements are per se irreparable injury. Once  
19 you decide that they are either literally false, false by  
20 necessary implication or likely to confuse, you find  
21 irreparable harm. But in this case I want to dwell on this,  
22 because I don't know -- it is hard for me to convey how  
23 serious this is.

24 The Court asked at the last hearing has Purple  
25 lost sales? What I said was we think so. We don't have the

1 evidence yet. By the way, Judge, you don't have to show  
2 lost sales, it is the threat of lost sales, but it is an  
3 interesting question.

4 Well, now we have new and direct evidence that  
5 consumers are believing the false statements and that we  
6 have lost sales. One of my favorite ones, not my client's  
7 favorite ones, but here is what somebody wrote. I canceled  
8 my order because the white powder that you refuse to  
9 disclose information about -- not true, Purple has disclosed  
10 lots of information. Where did they get that message? Mr.  
11 Monahan. I will continue to share articles and warn others  
12 about this until you address the problem.

13 So now what Mr. Monahan has done is not only has  
14 he convinced consumers of this false narrative, he is  
15 turning them into warriors against Purple. So Purple is now  
16 inundated with powder concerns. On a daily basis customer  
17 service gets phone calls, they get e-mails, they have chats.  
18 I left it at the office, and I had a stack of paper and I  
19 was going to do the old drama, you know, Judge, this is how  
20 many documents we have produced. Judge, here is the paper  
21 generated by 50 complaints and it is about that high.

22 Some of them are not very nice, F Purple, you  
23 know, to hell with you and other choice words. I am telling  
24 everyone. One fear is that he is creating this army of  
25 people that are now going to do the evil for him.

1 Another one is that you're now enabling all of the  
2 hypochondriacs in the world. Somebody wakes up and says,  
3 oh, my gosh, I have a cough today. I happened to be  
4 sleeping on a Purple mattress, it must be Purple. Right?  
5 It appears that that is working. That is what is happening.  
6 People are coming to Purple and saying all kinds of crazy  
7 things have been caused by the mattress, even when they have  
8 been sleeping on it with no complaints for a year.

9 Once people get that belief you can't shake it.  
10 Right? Let's say they are 50/50 and they see the bad stuff  
11 and then maybe they read the stuff that Purple tries to  
12 respond with, but if all things are equal, which mattress  
13 are you going to buy? This has happened with our customer  
14 service representative and officers talking to their own  
15 cousins. Yeah, I have seen it, but I can't make myself do  
16 it.

17 If you are familiar with Yelp, Your Honor, it is a  
18 review site for restaurants. My personal experience is I  
19 can see a restaurant and if I read one bad review, I might  
20 go to the next one down the block because it says the  
21 waitress was rude. In preparing for this hearing I figured  
22 out that something like 16 percent of reviews on Yelp are  
23 false and posted by their competitors. So now I am going to  
24 have an open mind. I was shocked to see that and I was  
25 shocked to see that I fell for it so easily.

1           Here is another one. Somebody said they are going  
2   to put a message on their truck, boycott your company.  
3   Telling everyone, all caps, not to purchase your Purple  
4   mattress. Some signs are going to be made to put on the  
5   truck as we drive to Burningham this year. We'll be happy  
6   to share our story with everyone about the powder. I don't  
7   know who this person is and they are so special that they  
8   are driving to Burningham, but apparently now there are  
9   going to be trucks with anti-Purple statements.

10           THE COURT: How much longer are you going to be?

11           MR. MAGLEBY: I will go seven minutes.

12           THE COURT: Okay.

13           MR. MAGLEBY: Can I have seven minutes?

14           THE COURT: Yes, you can.

15           MR. MAGLEBY: All right.

16           THE COURT: I know you have a lot to say, and I  
17   have read your briefing and I know what you have, and these  
18   are --

19           MR. MAGLEBY: So what is the potential harm facing  
20   Purple? Your Honor, the worst case is actually the loss of  
21   the entire business, okay, hundreds of millions of dollars.  
22   I hate to use Uber as an example. I especially hate to use  
23   Uber as an example because the evidence is that Uber  
24   actually did the bad things that it is getting in trouble  
25   for on social media. But it is the most obvious example of

1 what will happen if social media turns on you.

2 Mr. Monahan is the match, okay, and the mattress  
3 industry is a dry field. What Mr. Monahan has been doing  
4 and doing it as fast as he can since you dissolved the  
5 T.R.O., probably because he knows another one is coming, is  
6 trying to get that fire burning so it will burn. There will  
7 be nothing you nor I can do about that.

8 Uber's value has dropped something like  
9 \$15 billion because of the delete Uber handle. People are  
10 talking about the fact that the company could literally go  
11 out of business overnight because people can shift to a  
12 different app. There is nothing holding the customers  
13 there. Purple's entire business is online marketing. You  
14 say, gee, Jim, maybe you are kind of overstating this, but  
15 the company case, end of the business, but our founders and  
16 our owners are seriously concerned about that and all I have  
17 to show is that it is impossible. It is possible.

18 Let's talk about the bottom side. Tens of  
19 millions of dollars. With 1.7 million views of Monahan's  
20 YouTube video, if five percent of those are a lost sale, and  
21 remember how people might get there, is they watch the  
22 Purple video and then Monahan's video loads, and if  
23 five percent are lost sales, so 85,000 people times \$999 for  
24 a mattress is \$84.9 million in losses in four months. That  
25 is not a year. We would be over \$100 million in six months.



1 It is not just that. Purple loses the opportunity to get a  
2 satisfied customer, and noncustomers never become satisfied  
3 customers, and a huge part of Purple's growth has been  
4 people buying the mattress and telling their friends. We  
5 are not going to be able to quantify that adequately.

6 There is also a line of case law that says if the  
7 defendant can't pay the judgment, it also does not matter if  
8 you can quantify your damages. Mr. Monahan has told you he  
9 does not have any money. He makes \$50 a day from AdSense.  
10 We don't know what GhostBed has, but I doubt they can  
11 satisfy a \$100 million claim.

12 Now, let's go to the balance of the harms. You  
13 are balancing nothing against everything. Bet the company.  
14 Why do I say that, nothing? Well, GhostBed is an easy  
15 analysis. They tell you they have nothing to do with the  
16 website or anything Mr. Monahan does. Great. Then there is  
17 no harm to balance by ordering GhostBed not to cooperate  
18 with Monahan and not to control him and not to have him do  
19 the things they say that he is not doing.

20 Then as to Mr. Monahan, what harm has he presented  
21 to the Court? None. He has presented no discussion of  
22 economic or other harm, and he tells you he makes \$50 a day  
23 from AdSense on Google through the website and that that is  
24 what the website makes. Of course that begs the question,  
25 how much is GhostBed paying you to do some of this stuff?

1           Here is what we're willing to do, Your Honor. We  
2 will pay \$50 a day into a performance bond with this Court  
3 if he takes down that website or you order it taken down.  
4 That is the only quantification that he has given you.  
5 Purple's potential harm is the loss of the entire business.

6           Now we come to the public interest. Remember that  
7 Purple's only burden -- we don't have to actually show that  
8 it is good for the public interest. We just have to show  
9 that it is not bad for the public interest. Of course, the  
10 public has no interest in false and misleading statements.  
11 The defendants have manufactured 1.7 million hits on YouTube  
12 promoting a false narrative to help a hidden competitor and  
13 they are successfully deceiving the public. I ask you this  
14 question. Do you think those people would have the same  
15 visceral reaction that they have had if there was something  
16 that said and, by the way, Mr. Monahan has an association  
17 with GhostBed and it is he used to be the chief brand  
18 officer and he currently works for them and he is charge of  
19 their marketing? If he is paid by them, let's figure that  
20 out. It is not good for the public to be deceived.

21           Don't kid yourself, the H.M.R. defendants are not  
22 engaged in a public service. They are not trying to help  
23 the universe. They are not do-good crusaders. If they are  
24 so, quote, honest, then why not make a full disclosure about  
25 Mr. Monahan's past relationship and current relationship

1 with GhostBed? If his message is so compelling, then  
2 certainly he ought to be forthcoming with the people that he  
3 claims he is reporting to.

4 I said this at the last hearing, that an older  
5 lawyer once said to me anytime somebody starts talking about  
6 honesty and money, hold on to your wallet. That is what is  
7 going on here.

8 Then the second thing is clearly the defendants  
9 are doing this for the money. Look at Mr. Werner's  
10 declaration. He said GhostBed did not and does not  
11 remunerate Mr. Monahan or Honest Reviews, L.L.C. in any way  
12 for anything they do in connection with the  
13 honestmattress.com website. Notice how carefully that is  
14 worded.

15 In fact, you asked Ms. Yost questions about that  
16 at the last hearing. You saw that they were clearly trying  
17 to dance around this. Again, it does not pass the smell  
18 test, that this mattress review site is doing these attacks  
19 and not going to make any money from it and he is being paid  
20 by GhostBed to purportedly do other stuff.

21 To make it worse, Mr. Monahan is actually raising  
22 money from the public on the gofundme site where he is  
23 repeating this false narrative. It is the equivalent of a  
24 false campaign. I mean, he is telling people help me  
25 protect First Amendment rights and spread the truth.

1           Let me go to the relief, Your Honor, because I'm  
2           at my seven minutes, if you would indulge me.

3           Today we're really asking for two things. I want  
4           immediate relief against the defendants and an injunction  
5           ordering that they knock this off, but the second thing I  
6           want is a mechanism that -- well, maybe I don't need this.  
7           What I thought I was going to ask for was a temporary  
8           restraining order and then a preliminary injunction  
9           evidentiary hearing. Your Honor, if we are on a preliminary  
10          injunction motion and you have enough evidence, then I'm  
11          happy to get the preliminary injunction order.

12          If you have any concerns at all that we have not  
13          met our burden, we would request -- we would beg that you  
14          hold an evidentiary hearing. I mean, this morning when you  
15          said is Mr. Monahan here? I got kind of excited. I would  
16          like to see him in person. I would really like to see him  
17          right there on the stand answering questions from me and  
18          from his lawyer. If you have any doubts let's have an  
19          evidentiary hearing. I don't think we need that, but that  
20          is where we are.

21          In terms of the T.R.O., there are two parts.  
22          Number one, full disclosure and, number two, stop the false  
23          and misleading statements. In terms of the full disclosure,  
24          that needs to be made on H.M.R. media and on the website and  
25          on all social media where Mr. Monahan has been doing these

1 things.

2           The other thing is anybody that he has e-mailed to  
3 or any Facebook groups that he has been in, anything like  
4 that, we want a corrective statement. We want a corrective  
5 statement to the C.P.S.C. We want the full story out there.  
6 This is not a burden. This is low to no cost. Monahan  
7 claims an interest in the truth and he spends all day on  
8 social media sites anyway doing this. I mean, he answers  
9 comments on YouTube. He answers comments on reddit. We  
10 can't keep up with him. I mean, we can't even keep up with  
11 him. He must just sit there at his computer all day doing  
12 this. Great. Take some of that precious time, and God  
13 knows who is paying you for it, and come clean. What  
14 legitimate reason would they have for opposing that? Of  
15 course, they need to take down the false and misleading  
16 statements including things about cancer, coughing up blood,  
17 poison, asthma, take down the Facebook postings, get rid of  
18 the 1.7 million hit YouTube video, no more false or  
19 misleading statements, and even though it is implicit in  
20 such an order expressly, no boosting of the statements and  
21 no paying to have them promoted on Facebook, and even though  
22 it is implicit in the order, no false statements through  
23 third parties or surrogates. Don't go out and have other  
24 people do it, that which you have been ordered not to do.

25           In conclusion, Your Honor, I feel like you gave

1 these guys the benefit of the doubt at the last hearing.  
2 They came and they professed their innocence to the Court.  
3 They made sworn statements under oath. I believe the Court  
4 believed their representations in dissolving the T.R.O., and  
5 I believe the Court thought the defendants would act  
6 responsibly and I believe they took advantage of the Court  
7 giving them a little bit of slack. What they came out and  
8 did is they did not go back to the status quo, they turned  
9 it up. So instead of a match on the field, it is a  
10 flamethrower. They have demonstrated that without a strong  
11 order they are going to find clever ways to harm Purple. It  
12 is a big deal.

13 With that, Your Honor, I will finally sit down.

14 THE COURT: Thank you, Mr. Magleby.

15 Mr. Randazza.

16 MR. RANDAZZA: Your Honor, let me start with just  
17 the overarching issue here. The harm is nothing if you gag  
18 my client and then force my client to speak. What is the  
19 big deal? He is only making 50 bucks a day. That is what  
20 my grandfather made a month when he fought in World War II  
21 for that flag and the Constitution it represents.

22 I am disgusted that somebody would stand in this  
23 courtroom under that flag and look at that eagle and say  
24 that there is no harm because it is only 50 bucks a day.  
25 How much is the First Amendment worth? If you enter this

1 order, I guess we'll find out. It is worth nothing if you  
2 enter this order that they are asking you to enter.

3 He wants you to tell my client that my client  
4 cannot speak about the case, cannot speak about his  
5 suspicions, cannot report on this case, because that is what  
6 that YouTube that he lied to you about is. It is talking  
7 about the case. It is talking about the fact that he has  
8 been sued. Why is he doing that? Because while these guys  
9 are trying to sell what I'm convinced is a dangerous  
10 product, my client is trying to spread the truth.

11 So if they are facing an existential crisis  
12 because other people -- and I don't know how much of what he  
13 read you're taking as evidence, I mean, if we have an  
14 evidentiary hearing, I think witness number one is Mr.  
15 Magleby given his presentation. If that is an existential  
16 crisis, what is it for a media company? I realize that he  
17 is trying to show you and trying to scream and yell that  
18 this is just an arm of GhostBed, but that would be an  
19 awfully strange arm given that GhostBed's luxury line, and  
20 we showed this at the last hearing, was ranked very poorly  
21 on this site. Purple was ranked better.

22 So where is all of this coming from? I don't  
23 know, but if we're going to have a presentation like this  
24 where we have speculation, I think the speculation should be  
25 that this is a dangerous product. In fact, he brought up

1 the fact that they came up with a guy who said that this is  
2 just fine. I did discuss that report with Dr. Godleski and  
3 he said he was impressed by one part of it that was copied  
4 verbatim from Dr. Godleski's textbook chapter on the  
5 subject, but why do we need to put out another report? Why  
6 do we need to pay Dr. Godleski to do that? This is not a  
7 products liability case. All it is is there a fair question  
8 here? Is this something that somebody should be able to  
9 discuss? That flag and that eagle tell me that it is.

10 Now, he wants us also to believe, but I am not  
11 quite sure, because it changed in the presentation and it  
12 changed from the pleadings, but not to issue reports to the  
13 C.P.S.C. and not to file complaints with the government. So  
14 now we are not just talking about the free press or the free  
15 speech clause. We are also talking about the petition  
16 clause. I think the only clause left unscathed by this  
17 order that he wants might be the religion clause, but maybe  
18 that will fall next.

19 If we are violating, and I asked about that  
20 C.P.S.C. issue, and if we are somehow violating the Lanham  
21 Act by making a statement to the Consumer Products Safety  
22 Commission asking that the government take a look at this,  
23 wouldn't every complaint be the same? Every one filed in  
24 Federal Court. I mean, isn't it just as likely that they  
25 know they have got a dangerous product here, because I



1 remember at the last hearing you did ask them, well, what is  
2 in the powder? We still don't know. They are still saying  
3 they don't know. I'm sorry. They are not saying they don't  
4 know. They are saying they won't tell us. It is patented  
5 or patent pending, so they can't tell us about that. Well,  
6 then there is a fair question.

7 To shut this guy up from talking about that, from  
8 even asking that question, from rating this as a good value  
9 or a bad value, and then from talking about the case itself,  
10 that wouldn't be acceptable even if this was about anything  
11 short of a F.I.S.A. hearing. I don't see how while this  
12 company has the money and the wherewithal to put out its  
13 public relations side of things, my client needs to be  
14 gagged because my client has been hit with a S.L.A.P.P.  
15 suit? That is what this is. Why is he so worried about the  
16 money? Because he hoped we would just cave in and shut  
17 down. Well, sometimes when the First Amendment is in play  
18 people do fight, because they believe in the Constitution  
19 and they believe in the freedom of expression.

20 THE COURT: There is no constitutional right to  
21 lie and defame.

22 MR. RANDAZZA: Well, Your Honor, United States  
23 versus Alvarez might say differently, but I think you're  
24 correct. People will be held liable. Yes, if my client has  
25 lied and defamed them, then we will figure that out in this

1 case and there will be damages for that if my client has  
2 done that, but so far there is no evidence that my client  
3 has done that, none whatsoever.

4 There is evidence that you have been lied to. You  
5 have been lied to about the phone calls, because I have  
6 asked my friend here for a copy of this phone call record.  
7 Remember, this whole thing seems to turn on the new evidence  
8 of Ms. Anderson, yet I have a phone call here at 7:26 p.m.  
9 to their law firm that lasted for nine minutes. Nobody  
10 remembers what happened in that call? That happened on  
11 May 17th, but we're getting sandbagged with this, and this  
12 is the primary piece of evidence that they are asking you to  
13 rely on that somehow there is a great conspiracy that I  
14 don't think Alexander Dumas could have cooked up in order to  
15 come up with some kind of a justification that this review  
16 site is nothing more than a campaign to destroy Purple.

17 Your Honor, we rely on our papers and we rely on  
18 the arguments that we made last time.

19 I would like to move this into evidence, if I may.

20 Do you have other copies?

21 May I?

22 THE COURT: Yes. Hand it to my clerk, if you  
23 wouldn't mind.

24 Do you have any objection to the Court receiving  
25 this?

1 MR. MAGLEBY: No, Your Honor, not at all.

2 THE COURT: Whatever it is.

3 MR. MAGLEBY: With the caveat that we may have  
4 follow-up questions about additional evidence. We have had  
5 trouble getting documents from them.

6 THE COURT: Okay. I have received this. We'll  
7 mark it as Exhibit 1 to this hearing.

8 (Exhibit 1 was received  
9 into evidence.)

10 MR. RANDAZZA: Thank you, Your Honor.

11 THE COURT: Thank you, Mr. Randazza.

12 Ms. Yost, were you going to address this as well?

13 MS. YOST: Thank you, Your Honor.

14 We'll also be relying on our papers, except for  
15 one I think overarching theme, and that is that Mr. Magleby  
16 spent the better part of a half an hour speaking about  
17 e-mails and conversations and connections between GhostBed  
18 and Monahan, yet not one of these e-mails and not one of the  
19 declarations he has produced to you, and not one piece of  
20 testimony connects GhostBed to the Honest Mattress Reviews  
21 website, the website that is at issue in this case.

22 We have been up front that Mr. Monahan has been a  
23 consultant for GhostBed since day one. There is not a  
24 single e-mail, despite having discovery, despite having  
25 every e-mail that uses the phrase Honest Mattress Reviews or

1 Honest Reviews or the name of the co-defendants, which there  
2 are none, and then every e-mail regarding Ryan and his  
3 connection with the company, and not one of them talks about  
4 this website and suggests this website should be put out  
5 there, talks about anything that was on the website,  
6 nothing.

7 Yet Mr. Mableby would have you believe that this  
8 conspiracy that resulted in the creation of an entirely new  
9 website that had all of these YouTube videos that he talked  
10 to you about, was done so surreptitiously that not even the  
11 declarant that they are relying on who worked at the company  
12 had any actual evidence of the existence of this which just  
13 defies logic.

14 If she was working at the company, and it is not a  
15 big company, and this is not hundreds of people, and  
16 testifies to you that she thought there was a relationship  
17 here, but what she does not tell you is that I overheard a  
18 conversation where they were working on this website  
19 together. Or I overheard a conversation where the C.E.O.  
20 told Mr. Monahan that this would be a good idea and he  
21 should create this website to defame Purple. Or I saw that  
22 there were payments being made or anything. It is hard to  
23 prove a negative, Your Honor, but it is not there. In all  
24 of the evidence that they have produced to you, including  
25 the new evidence that they are relying on, none of it

1 connects to the actual website at issue and the statements  
2 that are being made.

3 We would ask that you look through the smoke to  
4 see that there really is no fire here.

5 Thank you.

6 THE COURT: Thank you, Ms. Yost.

7 Anything else from you, Mr. Magleby?

8 MR. MAGLEBY: Yes. I can't help myself.

9 Ms. Yost says, well, you know, they have had  
10 discovery and they have not found anything. I have two  
11 reactions to that. Reaction number one is they actually  
12 refused most of the discovery that we requested, some of  
13 which I talked about, and then they refused to hold a Rule  
14 26 conference. We finally got the Court's order, and then  
15 they delayed that for two or three weeks because they were  
16 too busy. When she says we have gotten discovery, we have  
17 not gotten discovery. We would love to have some discovery.

18 My second reaction is most conspirators don't  
19 actually put it into writing. That is what circumstantial  
20 evidence is about. Your Honor, of all of the people that  
21 can evaluate the circumstantial evidence and whether someone  
22 is truthful, it is you, and you have the evidence and I am  
23 confident in your ability to do that.

24 With regard to Mr. Randazza's discussion, I hate  
25 it, right, and here is what I hate. I am disgusted that Mr.

1 Randazza would hide behind the First Amendment and  
2 Mr. Monahan would hide behind the First Amendment, when what  
3 they are doing and the evidence shows they are doing has  
4 nothing to do with the First Amendment. It is a commercial  
5 enterprise designed to harm a commercial competitor. So the  
6 only thing worse than somebody who is dishonest or doing bad  
7 things is a hypocrite. That is the one thing I tell my  
8 kids. Don't be a hypocrite. When all of this evidence  
9 comes out I am going to remind all of us in this courtroom  
10 of Mr. Randazza invoking the First Amendment for his client  
11 who is most certainly not entitled to First Amendment  
12 protections.

13 Now, he asks you what is the First Amendment  
14 worth? Well, it will be worth nothing if you grant this  
15 order. I appreciate the attempt to pull on the Court's  
16 heartstrings, but what he has not done is given you any  
17 balance of the harms. He has given you nothing to weigh  
18 against the evidence that we have presented.

19 He then argues that, gee, the website ranks  
20 GhostBed kind of low. Well, they have never posted anything  
21 really negative about GhostBed, and they have manufactured  
22 and changed the ratings after this lawsuit, so it is no  
23 surprise, but here is the thing, saying something bad about  
24 GhostBed does not make the false statements you have made to  
25 the universe true. It does not make them true and it does

1 not undo the damage.

2 Then he says, well, I did discuss the report with  
3 Godleski and the only thing he was impressed with was the  
4 quote of Godleski. Great. So they actually took the time  
5 and the money and they spent the money to talk to Godleski  
6 about Dr. Lumpkin's report but did not have him respond.  
7 That is very telling.

8 Your Honor, I think we're entitled to the relief.  
9 Again, if you have any concerns at all what I would say is  
10 enter the order, and then let's set a preliminary injunction  
11 hearing, and what I would say is you enter the order and you  
12 say we will set the preliminary injunction hearing once the  
13 defendants comply with the discovery. That would enable us  
14 to test the veracity --

15 THE COURT: Say that last part again.

16 MR. MAGLEBY: What I would say is you enter the  
17 order, right, and if they want to challenge the order, then  
18 we can hold an evidentiary hearing.

19 THE COURT: If they want to challenge the order?  
20 They are challenging the --

21 MR. MAGLEBY: You are right, Your Honor. I would  
22 say enter the order.

23 THE COURT: What order?

24 MR. MAGLEBY: A preliminary injunction order that  
25 does the two things that I requested. Number one, full

1 disclosure and, number two, knock off the false statements.

2 THE COURT: I know. So I will do a preliminary  
3 injunction that says knock it off.

4 MR. MAGLEBY: I think the order will take some  
5 time.

6 THE COURT: What you asked for is to stop telling  
7 falsehoods about your product.

8 MR. MAGLEBY: Yes.

9 THE COURT: All right. Well, that order just  
10 invites an order to show cause why I shouldn't hold them in  
11 contempt. It just makes for more litigation, because it is  
12 very likely that what you think is false and misleading,  
13 they are going to come back in with all cannons firing  
14 saying it is not. It is a fair interpretation of their  
15 evidence, so an injunction that says that is difficult, and  
16 then you say full disclosure. Well, I don't know what  
17 full -- do you want me to tell, from Ms. Anderson's  
18 affidavit or declaration, to tell the defendants what has to  
19 be disclosed on the Honest Mattress Reviews website?

20 MR. MAGLEBY: Yes.

21 THE COURT: And if the order says be honest in the  
22 full connection between Mr. Monahan and GhostBed, do I say  
23 it has to be consistent with what Ms. Anderson said?

24 MR. MAGLEBY: No. I think --

25 THE COURT: Go further and then they say, well,



1 Ms. Anderson is not telling the truth. She is a former  
2 disgruntled employee. I think that is almost redundant  
3 sometimes, former and disgruntled, and so you want an  
4 injunction, and I get that, and you say our evidence, our  
5 scientist, who, by the way, and I don't mean this  
6 critically, but it is a fact, I think, that you hired to --

7 MR. MAGLEBY: Yes.

8 THE COURT: Like the tobacco industry hired all of  
9 the scientists to say that smoking wasn't harmful.

10 MR. MAGLEBY: Not like that.

11 THE COURT: Well, it is not like that, but there  
12 is that suspicion. You say we say our product is safe, and  
13 so in light of all of this Internet traffic and this Honest  
14 Mattress Reviews thing saying we are not, then we are going  
15 to hire a guy and, guess what, he told us it is safe. So  
16 you want me to say that I should find, and it is a fair  
17 request, that I should find that your guy is telling the  
18 truth about your product and that it is completely safe and  
19 it does not cause cancer and it does not have any unsafe  
20 properties.

21 They come back and say, well, wait a second. When  
22 we said it is not safe, we had a report, too, and you say,  
23 well, that report is junk because he just said if this and  
24 this and this happens, then it might be unsafe. Then you  
25 used your sticking your head in a bucket of water metaphor,

1 and it is a pretty good one --

2 MR. MAGLEBY: Yes.

3 THE COURT: -- but help me out with this. If I do  
4 what you ask, why will that do anything other than create  
5 more litigation?

6 MR. MAGLEBY: Well, I oversimplified it when I  
7 said that. If you say two lines, line number one, make a  
8 full disclosure, and, line number two, start making false  
9 statements we will have more litigation.

10 THE COURT: We will.

11 MR. MAGLEBY: Probably.

12 In response to your questions about, gee, here is  
13 the problem, and then they will come back with this and they  
14 will come back with that, the time to do that actually was  
15 before today. If they wanted to come back and challenge Dr.  
16 Lumpkin they had every opportunity to do it. If they wanted  
17 to come back and put in the evidence that you have just  
18 recited that they didn't put in, they had every opportunity  
19 to do it. While it may be difficult for the Court and the  
20 parties to craft an order that tracks what the evidence is,  
21 and what I think the obvious conclusions are, we still have  
22 to try to do it, because if we don't, what these defendants  
23 will do is they will continue to try to take advantage of  
24 the situation and, again, try to pour that gasoline on the  
25 fire before they can be stopped.

1           If they come back and they want to come back with  
2           that kind of evidence, then let them do it and let them  
3           challenge the order, but let's not have them go out and  
4           start the fire first.

5           I have thought about this and a couple of  
6           different ways that we could do it. One way is we craft an  
7           order that identifies the things that Mr. Monahan has said,  
8           which are now proven to be false and misleading, and we say  
9           he cannot go out and say these things or promote them or  
10          have third parties say them or things that are substantively  
11          similar.

12          Yes, that poses the risk of litigation over what  
13          is substantively similar. So, for example, there was one  
14          statement where he said ovarian cancer. So maybe our order  
15          says you can't say ovarian or cancer. And then he comes  
16          back, aha, Judge, your order was ambiguous. You didn't say  
17          I couldn't say brain cancer. Well, we can have a hearing  
18          about that and you can decide whether or not he is a man of  
19          reasonable intelligence and understands that that is  
20          substantively the same as saying cancer.

21          I mean, if that is what we have to do and we have  
22          to have an order to show cause hearing, then so be it,  
23          because when you're talking about a company with 700  
24          employees whose jobs are at risk, and all of the other harm  
25          that we have shown, that may just be our job.

1 Another way you could do it is you could enter  
2 detailed findings of fact, again, which track the evidence  
3 that we have presented and which says things like the truth,  
4 right, that there was no response to the Ms. Anderson  
5 declaration. I find that the representations to the Court  
6 about this and this and this were not true. There has been  
7 no evidence presented to challenge Dr. Lumpkin's report.  
8 Dr. Lumpkin concludes as follows. Dr. Godleski's report is  
9 not reliable, including for the reasons set forth in the  
10 Lumpkin report. You do a detailed statement of findings of  
11 fact which support the injunction order and you order them  
12 to post that. Right. It is the equivalent of corrective  
13 advertising.

14 You tell me what you're interested in and we will  
15 draft it. Do you want the findings of fact? Do you want a  
16 list of things that we think ought to be disclosed on the  
17 website and through social media? How do we push it out?  
18 It is going to be complicated, and I apologize for that, but  
19 let me just say this, that this mess that we're facing is  
20 not the fault of Purple or the Court. This mess would be a  
21 lot simpler if Mr. Monahan had not turned up the dial to 11  
22 after the T.R.O. was dissolved. He created this mess and  
23 we're left trying to have to find a way to fix it.

24 THE COURT: How do you know you are not creating a  
25 bigger mess? What this should do is it should go to trial.

1 I remember years ago I had a case involving a  
2 student at I think Bingham High School wearing a T-shirt  
3 that -- I can't remember if it was about P.E.T.A. or  
4 something, but, anyway it was difficult because the school  
5 district had --

6 MR. MAGLEBY: Yes. It is not free speech they  
7 say.

8 THE COURT: -- so they told them not to wear the  
9 T-shirt. I must have agreed. There was an injunction  
10 entered and they had to comply with the school dress code.  
11 The next day the kid showed up with a T-shirt that said my  
12 lawyer told me I can't wear that T-shirt anymore.

13 I didn't look at it myself, and this is just  
14 hearsay to me, and maybe it was from one of my clerks or  
15 someone after I entered your initial T.R.O., then, as I  
16 understand it, the other side of this, Mr. Monahan just did  
17 the same thing as the T-shirt kid, the equivalent --

18 MR. MAGLEBY: Right.

19 THE COURT: -- by putting up I have been gagged.  
20 That seems to be one of Mr. Randazza's favorite words.  
21 You're going to gag my client. Only if it is fair, but then  
22 they jump on the Internet and say I have been gagged. How  
23 does that not hurt you maybe just as badly as they saying  
24 your product is unsafe?

25 MR. MAGLEBY: Well, I am glad you brought that up.

1 We have to have the equivalent of a gag order that says we  
2 are not going to talk about this lawsuit until --

3 THE COURT: That is where it gets complicated.

4 MR. MAGLEBY: Yes. The fact that it is  
5 complicated, though, does not mean that you shouldn't try.  
6 The courts are our mechanism for doing it.

7 THE COURT: I think you have to recognize from  
8 where I sit, which is objective, and I am the equivalent of  
9 what they say Honest Reviews is and you say it isn't, but I  
10 am in the middle, and I don't care if you win or if they  
11 win. I just want the law to be applied correctly. From  
12 where I sit there is another side to this story.

13 MR. MAGLEBY: Sure.

14 THE COURT: I will say this, that after Ms.  
15 Anderson's declaration, your side, if you're thinking of the  
16 scales of justice, the weight on your side just got a lot  
17 stronger, a lot heavier in my mind. You are closer,  
18 substantially closer after having this thing aired out with  
19 both sides having a chance to address it, you are closer to  
20 meeting the standard of irreparable harm or the risk of it,  
21 sufficient to grant some kind of injunctive relief, and to  
22 meet the standard of starting to show me that you have a  
23 substantial likelihood of success on the merits.

24 If I credit Mrs. Anderson's in particular, and  
25 your other evidence of a circumstantial nature, then I think

1 the balance of harms starts to tip in your favor as well.  
2 I'm much more inclined to grant injunctive relief now than I  
3 ever have been before. I felt the first time I had relied  
4 too much on your side of the story. You're a good advocate.  
5 You're able to stand there, and you would still be going if  
6 I had not limited you to another seven minutes, and you are  
7 a strong and effective advocate for your side, but they are  
8 for their side and I don't know the whole story yet. I am  
9 going to need to mull this over.

10 I am inclined to hear evidence in an evidentiary  
11 hearing. That may be the best next step. I think we need  
12 to do that.

13 Tell me who you would expect to call as witnesses.

14 MR. MAGLEBY: Sure.

15 THE COURT: If we're going to do it and it is  
16 going to be any help, and if I can get closer to believing  
17 the essence of your case that what Mr. Monahan is doing is  
18 collaborating with GhostBed, and Mr. Werner in particular,  
19 to do a campaign of defamation against a competitor in the  
20 commercial marketplace, then I am inclined to not find that  
21 the First Amendment reaches that far, even in light of Mr.  
22 Randazza's argument that he has somehow got a journalist in  
23 the position of Mr. Monahan. That would go away. But other  
24 than Ms. Anderson and Mr. Werner, who would you expect to  
25 have at that evidentiary hearing?

1 MR. MAGLEBY: Certainly, Your Honor. I guess the  
2 question back to the Court, and there is nothing more  
3 irritating than a question back to a question --

4 THE COURT: Well, if it is irritating I won't  
5 answer it.

6 MR. MAGLEBY: How do we want to put on the initial  
7 case? Would we do that by additional declarations and then  
8 just have people cross-examine witnesses? That does save  
9 time.

10 THE COURT: We need some cross-examination.

11 MR. MAGLEBY: Absolutely.

12 If you said to me, Mr. Magleby, who would you  
13 call, I would probably start out with the founders, right,  
14 and then I would probably have some people from the customer  
15 service department testify, and I would put on some evidence  
16 of all of the e-mails and all of those kinds of things. I  
17 would have my experts testify. I would have an Internet  
18 expert talking about the irreparable harm and the threat to  
19 the company. I would have somebody talk about at least some  
20 of the damages, you know, just to show that there is damage.  
21 My fear is that we can't quantify it. Also, that the damage  
22 would be more than they could pay because that is  
23 irreparable harm. And then I certainly want to  
24 cross-examine Marc Werner, Ashley Werner and Ryan Monahan.  
25 I probably want to talk to Shack, the customer service



1 representative who said management told me to say cough up  
2 blood. I would like to do all of those.

3 I am sure they would want to talk to some of our  
4 guys. What I would say, Your Honor, is we have met our  
5 burden. There is a likelihood of success, but also if we  
6 have the other three factors weighing heavily, you don't  
7 even have to find likelihood of success.

8 THE COURT: I heard your argument. That  
9 evidentiary hearing sounds like it is going to take a month.

10 MR. MAGLEBY: No. I think we can do it in three  
11 days. I think what we do is say each side submit your  
12 affirmative case by declaration, and then you cross-examine  
13 people on their declarations and all of that.

14 What I would say, though, Your Honor, is that we  
15 are at a disadvantage because we don't have discovery. What  
16 I would say is you enter an order now and what you say is  
17 we'll have the preliminary injunction once the defendants  
18 have produced the evidence that is relevant to the  
19 injunction hearing. For example, we ask for all e-mails  
20 that say ryan@ghostbed.com, because they have said that he  
21 really didn't use that e-mail address. We have asked for  
22 all documents that say Ryan is the chief brand officer.  
23 They have refused that. We want phone records, and the  
24 great thing I love about them bringing phone records is we  
25 now know there are phone records. We want Mr. Werner's

1 phone records. We want Mr. Monahan's phone record, how  
2 often do they talk on the phone and that kind of thing. We  
3 want to show where Mr. Monahan is getting the money to pay  
4 for all of this, because here is my bad.

5 If we go and we have a preliminary injunction  
6 hearing and what we discover is that Mr. Monahan is being  
7 paid a bunch of money by GhostBed, and GhostBed is paying  
8 for his defense, that is going to be pretty important to the  
9 Court. My fear is if we don't have an order in place they  
10 are going to continue to try to light the fire. Let's  
11 create an incentive for them that they get that injunction  
12 hearing to protect these, oh, so valuable First Amendment  
13 rights, after they have given us the discovery that will  
14 allow us to determine whether or not the --

15 THE COURT: Say that last part again. Let's get  
16 an order --

17 MR. MAGLEBY: Enter an order now, an injunction  
18 order, and then let's set a hearing so you can further  
19 evaluate the evidence. What you say to them is, look, we're  
20 going to call witnesses and so there needs to be discovery  
21 and full disclosure relating to the issues I'm going to  
22 consider at the hearing. We'll have the hearing once  
23 Magleby gets those documents, because I want the incentive  
24 to be on them to cooperate and not to refuse to cooperate.

25 I think we need an order in the meantime, because

1 if there is no order in the meantime, and he has been  
2 pouring gasoline on the fire, he is going to pour a tank  
3 load of gasoline on the fire. We can craft an order that is  
4 narrow enough to satisfy Your Honor that it is tied to the  
5 evidence that we have presented and what actually happened  
6 here, whether you want it as a set of findings of fact or  
7 whether you want it as to what is the direction that I'm  
8 going to give. We can do that. Let us take a shot at that,  
9 and then you can go back through and say, Jim, you have gone  
10 too far. I'm sure there will be someplace where you will  
11 think that, but actually Ms. Greenwood, who is way more  
12 reasonable than me, will take the lead on drafting the order  
13 and I think you will find it appropriate.

14 THE COURT: All right. Thank you.

15 Anything you want to say about this last  
16 discussion I have had with Mr. Magleby, Mr. Randazza?

17 MR. RANDAZZA: Your Honor, it seems like what he  
18 wants from you now is an order that we have a trial. I  
19 mean, this does not sound like a preliminary injunction  
20 hearing. I ask you to please keep in mind that our position  
21 is that this is a S.L.A.P.P suit. This is a suit filed not  
22 because of the strength of the merits of the case, and I  
23 realize if you look at Ms. Anderson's declaration, boy, that  
24 looks really compelling. It is lies. I am going to prove  
25 it is lies. I hope that there will be sanctions when it

1 shows that it is lies. I hope she'll be charged with  
2 perjury when I can show she has lied.

3           You know, this is a big win for them if they get  
4 us to come back again for another trial, or for really a  
5 pretrial before the trial, and we're at 148 documents in  
6 this case and there is not even an answer yet. Every single  
7 motion here is the height of this table. That is the point  
8 here. That is what a S.L.A.P.P. suit is. You file a  
9 strategic lawsuit against public participation, and you make  
10 sure that somebody regrets exercising their First Amendment  
11 rights. I would ask that if Your Honor is going to do  
12 something like this, that Your Honor also put a strong  
13 element of control into it, because this is getting out of  
14 control, and it is very unfortunate --

15           THE COURT: What would be that element of control?

16           MR. RANDAZZA: Tell them that the First Amendment  
17 does apply and there is no preliminary injunction available  
18 in a free speech case. That is what I would say. If they  
19 want discovery, and they have asked for discovery, they have  
20 bombed us with discovery, we have given it to them  
21 previously, they are lying when they say they have not  
22 gotten it. They have got other discovery that they have  
23 requested that is not due yet. If we don't provide that,  
24 let them file a motion to compel, or let us file a  
25 protective order. I don't know if Your Honor handles those

1 discovery matters yourself or refers them to a magistrate,  
2 but that can be dealt with. This is all just smoke and all  
3 just hyperbole in order to try to get you to enter an  
4 unconstitutional order again. You let them write the last  
5 one, and I don't think this next one is going to be any  
6 better.

7 Thank you, Your Honor.

8 THE COURT: Thank you.

9 Ms. Yost, did you have something?

10 MS. YOST: Very quickly. Thank you for indulging  
11 me, Your Honor.

12 To Mr. Randazza's point that we have not even  
13 entered an answer yet in this case, and the amount of  
14 discovery that Mr. Magleby is asking for will take some  
15 amount of time, now that we have had our Rule 26 conference  
16 we are in the process of responding to discovery requests  
17 that we already have, and I would urge Your Honor to let  
18 that process proceed, without then pausing and having a  
19 flurry of depositions and witnesses fly in from Florida and  
20 muddy the waters when we can let the case take its natural  
21 course.

22 THE COURT: Thank you.

23 I'll take all of the motions, except the ones I  
24 ruled on earlier about the supplemental briefing, under  
25 advisement and try to get something out quickly.

Thank you for your arguments today.

The Court is in recess.

(Proceedings concluded.)